Damages – estimate?

SUPREME COURT OF THE UNITED STATES.

No. 282.

JAMES S. MARSH AND E. C. MARSH, PLAINTIFFS IN ERROR,

vs.

JOHN McPHERSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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a To the honorable Supreme Court of the United States:

I, Watson B. Smith, clerk of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, would most respectfully certify and return that in a certain cause determined in said court, wherein John McPherson is plaintiff and James S. Marsh and E. C. Marsh are defendants, that on the 13th day of August, A. D. 1879, the following writ of error was filed in said court, that is to say:

1 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between John McPherson, plaintiff, and James S. Marsh and E. C. Marsh, defendants, a manifest error hath happened, to the great damage of the said defendants in the said cause, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, shall be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 30th day of July, 1879.

[SEAL.] WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 292. D. United States circuit court, district of Nebraska. James S. Marsh, et al., plaintiffs in error, vs. John McPherson, defendant in error. Writ of error. Filed Aug. 13, 1879. Watson B. Smith, clerk.

2 That afterwards, on the 14th day of August, A. D. 1879, the following citation, with acceptance of service thereon endorsed, was filed in said court, that is to say:

3 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To John McPherson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second

Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein James S. Marsh and E. C. Marsh are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 30th day of July, 1879.

ELMER S. DUNDY, *Judge.*

I accept service hereof.

JNO. L. WEBSTER,
Att'y for Jno. McPherson.

(Indorsed:) No. 292. D. United States circuit court, district of Nebraska. James S. Marsh et al., plaintiff in error, vs. John McPherson, defendant in error. Citation. Filed August 14th, 1879. Watson B. Smith, clerk.

4 Thereupon afterwards, to wit, on the 13th day of August, 1879, the said defendants filed their bond, which is in words and figures following, to wit:

Know all men by these presents that we, James S. Marsh and E. C. Marsh, as principals, and John C. Bousfield and Benson M. Bailey, sureties, are held and firmly bound unto John McPherson in the full and just sum of two thousand dollars ($2,000), to be paid to the said John McPherson, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between John McPherson, plaintiff, and said Marshes, defendants, when judgment was rendered against the said James S. Marsh and Elisha C. Marsh, and the said James S. Marsh and Elisha C. Marsh having prosecuted a writ of error to said circuit court in the Supreme Court of the United States, having obtained and filed a copy thereof in the clerk's office of the said court to reverse the orders and judgments in the aforesaid suit, and a citation directed to the said John McPherson citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such that if the said James S. Marsh and Elisha C. Marsh shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

5 JAMES S. MARSH.
ELISHA C. MARSH.
J. C. BOUSFIELD.
B. M. BAILEY.

Approved by—

Said bond is endorsed as follows:

STATE OF NEBRASKA,
Nemaha County, ss:

We, Benson M. Bailey and John C. Bousfield, being duly sworn, say we signed the within bond as sureties, and we reside in Brownville, in said county and State, and we do each and both say that we each are worth and own in the said State, in our own names, over and above all exemptions and incumbrances of every kind and subject to execution, property exceeding the amount and value of two thousand dollars ($2,000.00).

J. C. BOUSFIELD.
B. M. BAILEY.

Subscribed in my presence by said J. C. Bousfield and B. M. Bailey, and by them sworn to before me this July 12, 1877, in said county.
[SEAL.] J. H. BROADY,
Notary Public.

STATE OF NEBRASKA,
Nemaha County, ss:

I, William H. Hoover, after being duly , say that I am acquainted with the above-named sureties, John C. Bousfield and Benson M. Bailey, and their financial responsibility, and consider either of them amply good as surety for two thousand dollars, and either of them *here* in said State unincumbered property liable to execution more than sufficient to make two thousand dollars.

WILLIAM H. HOOVER.

Subscribed in my presence by said William H. Hoover, and by him sworn to before me this 26th day of July, A. D. 1879, in said county.
[SEAL.] A. R. DAVISON,
Notary Public.

6 28' July, 1879. The within bond approved.
ELMER S. DUNDY, *Judge.*

No. 292. D. United States circuit court, district of Nebraska. McPherson vs. Marsh et al. Bond filed Aug. 13, 1879. Watson B. Smith, clerk.

7 That to the said writ of error the undersigned would respectfully certify and return that he has inspected the records and files in said cause, and that the following proceedings have been had:

That on the 15th day of April, A. D. 1878, the defendants, James S. Marsh and E. C. Marsh, caused to be filed and entered in this court in said cause a transcript from the district court for the county of Nemaha and State of Nebraska, which is in the words and figures following, to wit:

In the district court of Nemaha County, Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

Be it remembered that on the 15th day of January, 1878, a petition

in the above-entitled cause was filed in the clerk's office of said court, which reads in words and figures following, to wit:

Petition.

In the district court in and for Nemaha County, State of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH, AND E. C. MARSH, WHOSE first name is to plaintiff unknown, defendants.

John McPherson, plaintiff, complains of James S. Marsh and E. C. Marsh, whose first name is to plaintiff unknown, defendants, and for his cause of action against them aver that on the 16th day
8 of October, 1877, this plaintiff and said defendants entered into a contract in writing of the tenor and effect following, to wit:

"This agreement by and between John McPherson, of Nebraska, of the first part, and James S. Marsh and E. C. Marsh, of Pennsylvania, of the second part, witnesseth:

"That the said party of the first part, in consideration of the covenants of the said parties of the second part, as hereinafter stated, hereby covenants and agrees to sell and convey to the said parties of the second part by a good and sufficient deed of conveyance, with full covenant of warranty, excepting taxes, and free from all incumbrances except taxes, the following described real estate, situate in Nemaha County, Nebraska, to wit:

"Lots seven (7) and eight (8) and two and one-half feet wide off the east side of lot six, all in block (3) in the city of Brownville, in Nemaha County, Nebraska, together with all the privileges, buildings, and appurtenances thereunto belonging, and in addition thereto one-half of the stock of goods now in the store of the said party of the first part, on the said real estate at an invoice at cost with fair deductions for damages to goods since in store.

"And also for the same consideration aforesaid, the party of the first part covenants and agrees to cause to be duly conveyed to said parties of the second part all his right, title, and interest in and to the island in the Missouri River in Nemaha County, Nebraska, known as the Sonora Island, supposed to be six hundred and seventy acres of land. Also for the consideration aforesaid, the said party of the first part sells, assigns, and conveys unto the said parties of the second part the claim of the said party of the first part against the estate of Evan
9 Worthing, now in litigation in Franklin County, Nebraska.

In consideration of the said covenants of the said party of the first part, the said parties of the second part do hereby covenant and agree to pay the said party of the first part the consideration for the said property so as aforesaid conveyed to them by the said party of the first part, as follows:

"For the said real estate in the said city of Brownville, eighteen thousand one hundred and ninety dollars and thirty-seven cents (18,190.37) in combined reapers and mowers and self rakers, known as the 'Valley Chief,' as follows: Said machines number one to be taken at one hundred and seventy-five dollars each, and said machines number two to be taken at one hundred and seventy dollars each, to be delivered at the following places, to wit:

Place of delivery.	Number of machines.	
	No. one.	No. two.
Sabetha, Kansas	1	1
Fairbury, Nebraska	.....	1
Carleton, Nebraska	.....	5
Edgar	1	1
Hastings, Nebraska	17	.....
Hebron, Nebraska	1	.....
Karney, Nebraska	2	5
Fairmont, Nebraska	2	.....
Aurora	1	.....
York, Nebraska	1	.....
Crete, Nebraska	2	.....
Seward, Nebraska	1	1
Nebraska City, Nebraska	1	.....
Lincoln, Nebraska	13	.....
Elk Creek, Nebraska	1	.....
Beatrice, Nebraska	8	.....
Omaha, Nebraska	2	.....
Columbus, Nebraska	7	.....
Grand Island	5	6
Donnebrag, Nebraska	1	.....
Schuyler, Nebraska	1	.....
Fremont, Nebraska	9	.....
West Point, Nebraska	5	.....
Wahoo, Nebraska	4	.....
Total number	86	20

eighty-six machines, number one, and twenty machines, number two, all the said machines to be delivered in good condition, and free of all incumbrances, and clear of and free from the taxes of 1878, and all previous years, and clear and free of all claims of freight, and each machine to have two smooth sickles and one sickle-edge sickle. In this agreement the freight of each machine from the manufactory at Lewisburg, Union County, Pennsylvania, to the said place of delivery as aforesaid, is estimated at twenty-five dollars, and in each and all cases when such freights fall below said estimate of twenty-five dollars, the parties of the second part shall pay such deficiency below twenty-five dollars in money to the party of the first part. The said surplus of two hundred and fifty-nine dollars and sixty-three cents, of the said agreed value of said machines, over and above the said agreed value of said real estate in said city of Brownville, to be applied in paying for said real estate, in said Sonora Island, as hereinafter stated.

"For the said store property conveyed to them, as aforesaid
11 1 "*For the said store property conveyed to them, as aforesaid*, the
2 said parties of the second part agree to pay the said party of the
3 first part the price aforesaid, one thousand dollars in cash,
4 November first, 1877, and the balance in thirty days thereafter
5 without interest before due; for the said real estate in Sonora Is-
6 land, conveyed to them as aforesaid, the said parties of the
7 second part agree to pay the said party of the first part three
8 thousand six hundred dollars ($3,600) a' follows, two hundred
9 and fifty-nine dollars and sixty-three cents in the said sur-
10 plus of machines above mentioned, and the balance in the
11 said Valley Chief machines of the kind now called Marsh
12 number 4, at the agreed price of one hundred and seventy-five
13 dollars each, with four sickles each, two for reaping and two for
14 mowing, to be delivered in good condition, free of incumbrances,
15 the same as the Valley Chief machines above mentioned, at

the following places, to wit, eleven at Beatrice, Nebraska, provided that on this eleven the said party of the first part shall pay the freight from said Lewisburg to said Beatrice, and the balance on board the cars at said Lewisburg, consigned to said party of the first part and subject to his order. For the said claim against the estate of said Evan Worthing assigned to them the parties of the second part agree to pay all cost and expenses therein, subsequent to the decision of the county court of Franklin County, Nebraska, and take it with said other property above named in consideration of their covenants hereinbefore stated.

"In witness whereof the said party of the first part and the said parties of the second part hereby affix their hands and seals this October 16th, 1877.

"JOHN McPHERSON. [SEAL.]
"E. C. MARSH. [SEAL.]
"JAMES S. MARSH. [SEAL.]

"Witness J. H. BROADY to first two signatures, also to third signature."

"That at the date of the execution of said agreement aforesaid said defendants represented to this plaintiff, that they (the defendants) would at once proceed to visit each of the points named in said writing aforesaid, where said machines then were and at which places they were to be turned over to this plaintiff as stated in said writing, and would make settlement, with their agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all claims and liens of every kind and sort upon each and all of said machines and put in good condition and repair, each and all of said machines so as to have the same conform to the conditions of said agreement in writing. That about the 5th day of November, 1877, said defendants falsely and fraudulently represented to this plaintiff that they had made settlements with each and all of their said agents, at the several points in said written agreement named, and that they had adjusted and paid all liens and claims upon each and all of said machines of every kind, whatsoever, and that all of said machines were in good condition, and free of all incumbrances, and clear and free from the taxes of 1878, and all previous years, and free and clear of all claims for freight, and that each machine had two smooth sickles, and one sickle with sickle edge. Plaintiff further avers having full faith and confidence in said statements and declarations of said defendants aforesaid made; that he believing and relying upon the truth of the same accepted and acted upon said statements and representations as true; whereas in truth and in fact said representations and statements were false and fraudulent, as will more fully hereinafter appear, and that by reason of the premises this plaintiff was misled and deceived and damaged, as is hereinafter more fully set forth.

That at said time this plaintiff had no knowledge of said facts and the condition of said machines, and had no means of acquiring the same, other than said statements and representations so made by said defendants, and this each of said defendants well knew when they so made said false and fraudulent representations and statements and the same were so made to deceive this plaintiff. That afterwards and on or about the 5th

day of November, 1877, this plaintiff, relying upon the truth of said representations and statements as aforesaid, did convey to said defendants by good and sufficient deed all said real estate in said written agreement aforesaid described to be so conveyedby said plaintiff to said defendants. That said plaintiff and said defendants did have one-half of said stock of goods in *in* said written agreement appraised and at the sum of $4242.10 and the plaintiff did at said time turn the same over to said defendants at said appraised value of $4.242.10 plaintiff further saith that he did perform all and singular the covenants and agreements on his part to be performed and kept. That at the date of the performance of said covenants and agreements on the part of this plaintiff said defendants did, by their written agreement, dated November 5th, 1877, acknowledge payment for all of said machines named in the list in said first contract, aggregating eighty-six number ones and twenty number twos, and did authorize said plaintiff to receive the same at the places named in said first contract free and clear of all liens or taxes up to, and including taxes for 1878, and in good order and condition, as set forth in said first contract. That in said last agreement said defendants did also authorizethis plaintiff to receive said eleven machines, called Marsh number four, at Beatrice, and did further agree to deliver to plaintiff on the cars in Pennsylvania eight machines number four, and that said defendants did, in said last agreement covenant and warrant that said eighty-six number ones and twenty number twos and eleven number fours were all at the places named aforesaid and were in good condition for delivery as provided in said agreement first made, and that said eight "number fours" should be delivered as aforesaid, and that they (the said defendants) would stand good to this plaintiff for any breach or failure of said warranty; that said machines aforesaid, at the agreed price aforesaid, set forth in said contracts aggregate the value and sum of $21,775.00, and the plaintiff, upon information and belief, avers the fact to be that said machines were then of the value of $21,775, when put in good condition and free from all liens as provided in said contracts and that said defendants received said property so conveyed to them as aforesaid by this plaintiff in full payment for all said machine'; that since said date this plaintiff has demanded said machines at said several places named in said agreement, and in the number and in the condition therein set forth including the eight machines to be shipped from Lewisburg and 30 days prior to commencement of this suit, but plaintiff avers the fact to be that said machines at each of said places named were in the charge of and under the control of agents of said defendants; that each and all of said machines were encumbered by liens for freight and for storage, and commissions due such agents, and that the same were in bad condition from exposure and age, and that said machines were not complete in many particulars, and that at many of said places there were not the number of machines named in said contract. Plaintiff further avers the fact to be, that said agents of said defendants as aforesaid, and said defendants, although requested by plaintiff, refused and do still refuse to deliver said machines or any part

thereof to this plaintiff, and that by reason of the premises he has been damaged in the sum of $21,775.00.

II. Plaintiff further avers that by the terms of said contract the freight on said 86 number ones, and 20 number twos, and 11 number fours was estimated at $25.00 each, and so added in to the price for which this plaintiff paid said defendants, and that if said freight did in fact fall below said $25.00 the said defendants were to pay to this plaintiff the difference between said $25.00 and the actual freight on each of said machines as is in detail set forth in said contract, hereinbefore set out. This plaintiff avers that in truth and in fact said freight on each of said machines did not average over $12.50 whereby by the terms of said contract this plaintiff has become entitled to have and recover of said defendants the further sum of $1,462.00. Wherefore plaintiff prays judgment against said defendants for the sum of twenty-three thousand two hundred and thirty-seven dollars ($23,237), with interest from the 5th day of November, 1877.

J. L. WEBSTER & WM. S. ROGERS,
Att'y for Plaintiff.

STATE OF NEBRASKA, *Nemaha County, ss:*

John McPherson being first duly sworn, deposes and says that he is the plaintiff named in the foregoing petition, and that he knows the contents of the same, and that he believes the facts therein stated to be true.

JOHN McPHERSON.

Sworn to before me and subscribed in my presence this 15th day of January, 1878.

WILLIAM H. HOOVER, *Clk.*

(On the back of which is the following endorsements, to wit:) Filed January 15th, 1878. William H. Hoover, cl'k.

On the same day, to wit, on the 15th day of January, 1878, a precipe was filed in said cause, which reads in words and figures following, to wit:

Precipe.

District court in and for Nemaha County, Nebraska.

JOHN P. McPHERSON
vs.
JAMES S. MARSH, WHOSE FIRST NAME IS TO plaintiff unknown.

The clerk of said district court will issue an order of attachment on the affidavit filed in this cause, and also an order of attachment directed to sheriff of Johnson Co., Neb., and a summons indorse' thereon $23,237.00, with 10 % interest from 5th day of November, 1877.

(On the back of which is the following endorsement, to wit:) Filed January 15th, 1878. William H. Hoover, cl'.

On the same day, to wit, on the 15th day of January, A. D. 1878, a

summons was issued in said cause, which reads in words and figures following, to wit:

Summons.

STATE OF NEBRASKA,
Nemaha County, ss:

The State of Nebraska to the sheriff of Nemaha County, greeting:

17 You are hereby commanded to notify James S. Marsh and E. C. Marsh, whose first name to plaintiff is unknown, defendants, that they have been sued by John McPherson, plaintiff, in the district court of the second judicial district in and for Nemaha County, Nebraska, and unless they answer by the 18th day of February, A. D. 1878, the petition of said John McPherson filed against them in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make return of this summons on or before the 28th day of January, A. D. 1878.

Witness my hand and the seal of said court this 15th day of January, A. D. 1878.

[L. S.] WILLIAM H. HOOVER, *Clk.*

(On the back of which are the following endorsements, to wit:) The plaintiff in this action claims judgment for the sum of $23,237.00, together with interest thereon from the 5th day of November, A. D. 1877, at the rate of 10 per cent. per annum. Attest: William H. Hoover, cl'k.

STATE OF NEBRASKA,
County of Nemaha, ss:

This summons came to hand on the 16th day of January, A. D. 1878, at 7 o'clock a. m., and I return this summons not served, the defendants, James S. Marsh and E. C. Marsh, not being found in Nemaha County.

R. V. BLACK,
Sheriff.

Returned and filed January 28, 1878.

WILLIAM H. HOOVER,
Clerk.

On the same day, to wit, on the 15th day of January, 1878, an affidavit for attachment was filed in said cause, which reads in words and figures following, to wit:

18 *Affidavit.*

In the district court in and for Nemaha County, State of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, WHOSE first name is to plaintiff unknown, defendants.

STATE OF NEBRASKA,
Nemaha County, ss:

The said John McPherson, plaintiff, being first duly sworn, deposes and says that the said John McPherson has commenced action in said court

against the said James S. Marsh and E. C. Marsh, defendants, to recover the sum of $23,237.00, damages for the breach of a certain contract in writing made and entered into, by and between said plaintiff and said defendants, by which said defendants agreed to deliver to said plaintiff certain agricultural machines, as hereinafter more fully appears. Affiant further say' that on the 16th day of October, 1877, this affiant and said defendants entered into a contract in writing of the tenor and effect following, to wit:

"This agreement by and between John McPherson, of Nemaha, of the first part, and James S. Marsh and E. C. Marsh, of Pennsylvania, of the second part, witnesseth:

"That the said party of the first part, in consideration of the covenants of the said parties of the second part, as hereinafter stated, covenants and agrees to sell and convey to the said parties of the second part by a good and sufficient deed of conveyance, with full covenants of warranty, excepting taxes, and free from all incumbrances except taxes, the following described real estate situated in Nemaha County, Nebraska, to wit:

"Lots seven (7) and eight (8) and two and one-half feet wide
19 off the east side of lot six (6) all in block 3, in the city of Brownville, in Nemaha County, Nebraska, together with all the privileges, buildings, and appurtenances thereunto belonging. And in addition thereto one-half of the stock of goods now in the store of the said party of the first part, on the said real estate at an invoice at cost, with fair deductions for damages to goods since in store. And also, for the same consideration aforesaid, the party of the first part covenants and agrees to cause to be duly conveyed to said parties of the second part all his right, title, and interest in and to the island in the Missouri River, in Nemaha County, Nebraska, known as the Sonora Island, supposed to be six hundred and seventy acres of land. Also for the consideration aforesaid, the said party of the first part sells, assigns, and conveys unto the said parties of the second part the claim of the said party of the first part, against the estate of Evan Worthing, now in litigation, in Franklin County, Nebraska. In consideration of the said covenants of the said party of the first part the said parties of the second part do hereby covenant and agree to pay to the party of the first part the consideration for the said property so as aforesaid conveyed to them by the said party of the first part, as follows: For the said real estate in the said city of Brownville, eighteen thousand one hundred and ninety dollars and thirty-seven cents ($18,190.37), in combined reapers and mowers and self-rakers, known as the 'Valley Chief,' as follows: said machines number one to be taken at one hundred and seventy dollars each, and said machines number two to be taken at one hundred and seventy dollars each, to be delivered at the following places, to wit:

20 Place of delivery.	Number of machine.	
	No. one.	No two.
Sabetha, Kansas	1	1
Fairbury, Nebraska	.....	1
Canteten, Nebraska	.....	5
Edgar	1	1
Hastings, Nebraska	17	.....
Hebron, Nebraska	1	.....
Kearney, Nebraska	2	5
Fairmont, Nebraska	2	.....
Aurora	1	.....
York, Nebraska	1	.....
Crete, Nebraska	2	.....
Seward, Nebraska	1	1
Nebraska City, Nebraska	1	.....
Lincoln, Nebraska	13	.....
Elk Creek, Nebraska	1	.....
Beatrice, Nebraska	8	.....
Omaha, Nebraska	2	.....
Columbus, Nebraska	7	.....
Grand Island	5	6
Donnehoo, Nebraska	1	.....
Scuyler, Nebraska	1	.....
Fremont, Nebraska	9	.....
West Point, Nebraska	5	.....
Wahoo, Nebraska	4	.....
Total number	86	20

"Eighty-six machines number one, and twenty machines number two, all the said machines to be delivered in good condition and free
21 of all incumbrances, and clear of and free from the taxes of 1878, and all previous years, and clear of and free of all claims of freight, and each machine to have two smooth sickles, and one sickle-edge sickle. In this agreement the freight of each machine from the manufactury at Lewisburg, Union County, Pennsylvania, to the said place of delivery as aforesaid, is estimated at twenty-five dollars, and in each and all cases, when such freights fall below said estimates of twenty-five dollars, the parties of the second part shall pay such deficiency below twenty-five dollars in money to the party of the first part. The said surplus of two hundred and fifty-nine dollars and sixty-three cents of the said agreed value of said machines over and above value of said real estate in said city of Brownville, to be applied in paying for said real estate in said Sonora Island, as hereinafter stated. For the said store property conveyed to them as aforesaid, the said parties of the second part agree to pay the said party of the first part the price aforesaid, one thousand dollars in cash, November 1st, 1877, and the balance in thirty days thereafter, without interest before due. For the said real estate in Sonora Island, conveyed to them as aforesaid, the said parties of the second part agree to pay the said party of the first part, three thousand six hundred dollars ($3,600.00), as follows;

"Two hundred and fifty-nine dollars and sixty-three cents in the said surplus of machines above mentioned, and the balance on the said 'Valley Chief' machines, of the kind now called 'Marsh No. 4,' at the agreed price of one hundred and seventy-five dollars each, with four sickles each, two for reaping and two for mowing, to be delivered in good condition, free of incumbrances, the same as the 'Val-
22 Chief' machines above mentioned, at the following places, to wit, eleven at Beatrice, Nebraska, provided that on this eleven

the said *said* party of the first part shall pay the freight from said Lewisburg to said Beatrice, and the balance on board the cars at said Lewisburg, consigned to said party of the first part, and subject to his order. For said claim against the estate of said Evan Worthing, assigned to them, the parties of the second part agree to pay all costs and expenses therein, subsequent to the decision of the county court of Franklin County, Nebraska, and the' take it with said other property above named, in consideration of their covenants hereinbefore stated. In consideration whereof the said party of the first part, and the said parties of the second part hereby affix their hands and seals this October 16th, 1877.

"JOHN McPHERSON. [SEAL.]
"E. C. MARSH. [SEAL.]
"JAMES S. MARSH. [SEAL.]

"Witness J. H. BROADY to first two signatures, also to third signature."

That at the date of the execution of said agreement aforesaid, said defendants represented to this affiant that they (the defendants) would at once proceed to visit each of the points named in said writing aforesaid, where said machines then were, and which places they were to be turned over to this affiant as stated in said writing, and would make settlement with their agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all claims and liens of every kind and sort upon each and all of said machines, and put in good condition and repair each and all of said machines so as to have the same conform to the conditions of said agreement in writing. That about the 5th day of November, 1877,
23 said defendants represented to this af'iant that they had made settlements with each and all of their said agents at the several points in said written agreement named, and that they had adjusted and paid all liens and claims upon each and all said machines of every kind whatsoever, and that all of said machines were in good condition, and free of all incumbrances, and clear and free from the taxes of 1878 and all previous years, and free and clear of all claims for freight, and that each machine had two smooth sickles, and one sickle with sickle-edge. That affiant verily believes that said representations so made as aforesaid, were falsely and fraudulently made to affiant by said defendants.

Affiant further says, that having full faith and confidence in said statements and declarations of said defendants aforesaid made; that he, believing and relying upon the truth of the same, accepted and acted upon such statements and representations as true, whereas in truth, and in fact, said representations and statements were false and fraudulent, as will more fully hereinafter appear, and that by reason of the premises this affiant was misled and deceived, and damaged as is hereinafter more fully set forth. That at said time this affiant had no knowledge of said facts and the condition of said mazchines other than said statements and representations so made by said defendants, and this each of said defendants well knew when they so made said false and fraudulent representations and statements. That afterward and on or about the 5th day of November, 1877, this plaintiff, relying upon the truth of said representations and statements as aforesaid, did convey to said defendants by good and sufficient deed, all said real estate in said written agreement aforesaid described to be so conveyed by this affiant to said defendants. That this affiant and said defendants did have

one-half of said stock of goods in said written agreement mentioned
24 appraised and at the sum of $4,242.10; and this affiant did at said time turn the same over to said defendants at said appraised value of $4,242.10, saving some cigars. Affiant further saith that he did perform all and singular the covenants and agreements on his part to be performed and kept. That at the date of the performance of said covenants and agreements on the part of this affiant, said defendants did, by their written agreement, dated November 5th, 1877, acknowledge payment for all of said machines, and did authorize this affiant to receive the same at the places named in said first contract, free and clear of all liens or taxes, and in good order and condition. That in said last agreement said defendants did also authorize this affiant to receive said machines, called Marsh number four, at Beatrice, and did further agree to deliver to affiant on the cars in Pennsylvania eight machines number four; and that said defendants did in said last agreement covenant and warrant that said eighty-six number ones and twenty number twos and eleven number fours were all at the places named aforesaid, and were in good condition for delivery, as provided in said agreement first made; and that said eight number fours should be delivered as aforesaid, and that they (the defendants) would stand good to this plaintiff for any breach of said warranty; that said machines aforesaid, at the agreed price aforesaid set forth in said contracts, aggregate the value of and sum of $21,775.00; and affiant, upon information and belief, avers the fact to be that said machines were then of the value of $21,775.00 when put in good condition and free from all liens as provided in said contracts; and that said defendants received said property so conveyed to them as aforesaid by this affiant in full apx ment for all said machines. That since said date this affiant has demanded said machines at many of said several places named in
25 said agreements, and in the number and in the condition therein set forth; but affiant avers the fact to be that each of said machines at said places named were in the charge of and under the control of agents of said defendants. That each and all of said machines were incumbered by liens for freight and for storage and for commissions due agents, and that the same were in bad condition from exposure and age, and that said machines were not complete in many particulars, and that at many of said places there were not the number of machines named in said contracts.

Affiant further saith that said agents of said defendants aforesaid, although requested by this affiant, refused, and do still refuse, to deliver said machines or any part thereof to this affiant, and that by reason of the premises he has been damaged in the sum of $21,775.00.

Affiant further avers that by the terms of said contract the freight on said 86 number ones and 20 number twos and 11 number fours was estimated at $25.00 each, and so added in to the price for which this affiant paid said defendants, and that if said freight did in fact fall below said $25.00, then said defendants were to pay to this affiant the difference between said $25.00 and the actual freight on each of said machines, as is in detail set out in said contract hereinbefore set forth. Affiant avers that in truth and in fact said freight on each of said machines did not average over $12.50, as affiant believes, whereby by the terms of said contract this affiant has become entitled to have and recover of said defendants the further sum of $1,462.00. That by reason of the premises aforesaid affiant is entitled to have and recover of said defendants the full sum of $23,237.00, with interest from the 5th day of November, 1877. And affiant further says that said claim is

just, and that there is now justly due him by reason of the premises from said defendants the sum of $23,237.00, and that he believes
26 that by reason of the premises he has sustained damage to the sum of $23,237.00, and that he justly ought to recover that sum.

Affiant further says that the said Jame' S. Marsh and E. C. Marsh, the defendants in this action, are both of them non-residents of the State of Nebraska, and are both residents of the State of Pennsylvania; and further affiant saith not.

X JOHN McPHERSON.

Subscribed in my presence and sworn to before me this 15th day of January, 1878.

WILLIAM H. HOOVER, *Clk.*

On the back on which is the following endorsement, to wit: Filed January 15th, 1878.

WILLIAM H. HOOVER, *Clk.*

On the same day, to wit, on the 15th day of January, A. D. 1878, an order of attachment was issued in said cause, directed to the sheriff of Johnson County, which reads in words and figures following:

Order of attachment.

STATE OF NEBRASKA,
County of Nemaha, ss:

The State of Nebraska to the sheriff of Johnson county greeting:

Whereas John McPherson has, on the necessary affidavit being filed, obtained an order of attachment against James S. Marsh and E. C. Marsh, whose first name to plaintiff is unknown, in a certain action now pending in the district court within and for said county of Nemaha, wherein the said John McPherson is plaintiff and the said James S. Marsh and E. C. Marsh are defendants, to recover of the said defendants the sum of twenty-three thousand two hundred and thirty-seven ($23,237.00) dollars, with interest from the 5th day of 'ovember, 1877, at 10 per cent. per annum; now, therefore, this is to command you to attach the lands, tenements, goods, chattels, stocks, and interest
27 in stocks, rights, credits, monies, and effects of the said James S. Marsh and E. C. Marsh, defendants, in your county, not exempt by law from being applied to the plaintiff's claim, or so much thereof as will satisfy to the said plaintiff his said claim of twenty-three thousand two hundred and thirty-seven dollars, with interest aforesaid, and the probable costs of this action, not exceeding fifty dollars, and of this order and your proceedings thereon do you make due return on the 28th day of January, A. D. 1878.

Witness my hand and the seal of said district court, at Brownville, in the said county of Nemaha, this 15th day of January, A. D. 1878.

[L. S.] WILLIAM H. HOOVER, *Clk.*

On the back of which are the following endorsements, to wit: On this 23d day of January, 1878, I went with C. E. Smith and Elmer Burnam and appraised the north-half of section one, town. six, range nine, in Johnson County, the property of James S. Marsh and E. C. Marsh. I left a copy of the order of attachment on the said land, and also a copy with the county clerk for record. C. E. Smith and

Elmer Burnam being sworn to appraise the land at its true value, we appraised said land at fifteen hundred dollars.

C. H. HALSTED,
Sheriff Johnson County, Nebraska.

Returned and filed January 26, 1878.

WILLIAM H. HOOVER, *Clk.*

To said order of attachment there is attached an appraisal, which reads in words and figures following, to wit:

Appraisal.

THE STATE OF NEBRASKA, *County, ss:*

We, C. H. Halsted, sheriff of Johnson County, and State of Nebraska, and C. E. Smith and Elmer Barnam, two disinterested freeholders, residents of said county, the said C. E. Smith and Elmer Barnam having been first duly sworn by said sheriff, do, upon actual view thereof, appraise the property, hereinafter described, at its real money value, as the property of James S. Marsh and E. C. Marsh, taken by virtue of an order of attachment issued out of the district court of the second judicial district of Nebraska, in and for the county of Nemaha, wherein John McPherson is plaintiff and the said James S. Marsh and E. C. Marsh *is* defendant', to wit: The north half of section one, township six, range nine, in Johnson County, Neb., valued at the sum of fifteen hundred dollars. The interest of James S. Marsh and E. C. Marsh, defendant', we value at fifteen hundred dollars.

28

Given under our hands this 23rd day of January, A. D. 1878.

C. E. SMITH.
ELMER BURNAM.
C. H. HALSTED.

I hereby certify that the above named C. E. Smith and Elmer Burnam are freeholders and residents of said Johnson County, and that they were by me duly summoned and sworn to make the appraisement, as 'bove set forth, on the day and year last above written.

C. H. HALSTED,
Sheriff Johnson County.

(On the back of which is the following endorsement, to wit:) Filed the 26th day of January, A. D. 1878.

WILLIAM H. HOOVER, *Clk.*

On the same day, to wit, on the 15th day of January, A. D. 1878, an order of attachment was issued in said cause, directed to the sheriff of Nemaha County, which reads in words and figures following, to wit:

Order of attachment.

STATE OF NEBRASKA,
County of Nemaha, ss:

The State of Nebraska to the sheriff of Nemaha County, greeting:

Whereas, John McPherson has this day, on the necessary affidavit being filed, obtained an order of attachment against James S. Marsh

and E. C. Marsh, whose first name is to plaintiff unknown, in a
29 certain action now pending in the district court within and for said county of Nemaha, wherein the said John McPherson is plaintiff, and the said James S. Marsh and E. C. Marsh are defendants, to recover of the said defendant' the sum of twenty-three thousand two hundred and thirty-seven (823,237.00) dollars, with interest from the 5th day of November, 1877, at 10 per cent. per annum.

Now, therefore, this is to command you to attach the lands, tenements, goods, chattels, stocks and interest in stocks, rights, credits, monies, and effects of the said James S. Marsh and E. C. Marsh, defendants, in your county, not exempt by law from being applied to the plaintiff' claim, or so much thereof as will satisfy to the said plaintiff the said claim of twenty-three thousand two hundred and thirty-seven dollars, and interest aforesaid, and the probable costs of this action, not exceeding fifty dollars, and of this order, and your proceedings thereon, do you make due return on the 28th day of January, A. D. 1878.

Witness my hand and the seal of said district court, at Brownville, in the said county of Nemaha, this fifteenth day of January, A. D. 1878.

[L. S.] WILLIAM H. HOOVER, *Clk.*

On the back of which are the following endorsements, to wit:

STATE OF NEBRASKA,
County of Nemaha, ss:

This order of attachment came to hand on the 16th day of January, A. D. 1878, at 7 o'clock a. m., and on the 16th day of January, A. D. 1878, in said county, I, as commanded, served this order of attachment by a true and certified copy of the same, with all the endorsements thereon, which more fully appears by my return hereto attached.

R. V. BLACK, *Sheriff.*

Returned and filed January 18, 1878.

WILLIAM H. HOOVER, *Clk.*

30 *Sheriff's return.*

To said order of attachment is attached sheriff's return, which reads in words and figures following, to wit:

This writ came to hand January 16th, 1878, at 7 o'clock a. m., and according to the command of the written order of attachment, I did, on the 16' day of January, 1878, attach, in the presence of Augustus Moore and Ben. B. Thompson, two disinterested residents and freeholders of said county of Nemaha and State of Nebraska, the following lands and tenements, goods and chattels, the property of James S. Marsh and E. C. Marsh, to wit, lots 7 & 8, and 2½ feet wide off the east side of lot six; the said two and one half feet running the entire length of said lot No. six, all in block No. 3, in the city of Brownville, according to the recorded plat thereof, in Nemaha County, Nebraska, and in connection with the said Augustus Moore and Ben. B. Thompson, having first duly sworn the said Augustus Moore and Ben. B. Thompson, made an inventory and valuation thereof in writing, which is herewith returned marked "A," and I left with H. C. Lett, A. H. McGee, John McPherson, Joseph Opelt, and I. S. Nace, the occupants of said real estate, certified copies of the order, and on the same day, in the presence of said Augustus Moore and Ben. B. Thompson, two freeholders

and residents of Nemaha County, as aforesaid, I did attach the following personal property, to wit, three Marsh combined reaper and mowing machines, and in connection with the said August. Moore and Ben. B. Thompson, they having been sworn as aforesaid, made an inventory and valuation of said machines, subject to the lien or claim of the Nebraska Railway for freight and charges thereon, which inventory is herewith returned. I did on same day attach, in the presence of said August. Moore and Ben. B. Thompson, one trunk of goods and the trunk, and in connection with said Ben. B. Thompson and Augustus Moore, they having been first duly sworn as aforesaid, made an inven-
31 tory and valuation of said trunk and contents in writing, which is herewith returned, and I delivered to W. S. Morey, who was in possession of said machines, and to Joseph B. Docker, who was in possession of said trunk and contents, each a true and certified copy of this order of attachment. The said trunk and contents I took into my possession, and on this same day I attached a stock of goods, heretofore attached, inventoried, and valued in a case now pending in this court, wherein the First National Bank of Brownville is plaintiff and James S. Marsh et al, are defendants, and made no appraisement or valuation of said stock of goods for that reason, said goods having been attached, inventoried, and appraised in said action now pending in this court but return a schedule of said stock of goods attached in said action, and also by virtue of this order, and I delivered to Davidson Plasters, who was in possession of said stock of goods, a certified copy of this order. All done in Nemaha County, Nebraska.

RICHMOND V. BLACK, *Sheriff.*

To said sheriff's return is attached an appraisal, which reads in words and figures following, to wit:

Appraisal.

THE STATE OF NEBRASKA,
Nemaha County, ss:

We, Richmond V. Black, of Nemaha County and State of Nebraska, and Augustus Moore and Ben. B. Thompson, two disinterested freeholders, residents of said county, the said Augustus Moore, and Ben. B. Thompson, having been first duly sworn by said sheriff, do, upon actual view thereof, appraise the property hereinafter described at its real money value, as the property of James S. Marsh and E. C. Marsh, taken by virtue of an order of attachment issued out of the district court of the second judicial district of Nebraska, in and for the
32 county of Nemaha, wherein John McPherson is plaintiff and the said James S. Marsh and E. C. Marsh are defendants, to wit: Lot' seven and eight (7 & 8), and two and one-half feet (2½) wide off the east side of lot six, (6), the said two and one-half (2½) feet, running the entire length of said lot No. six (6), all in block No. three (3), in the city of Brownville, according to the original plat of said city, all in Nemaha County, State of Nebraska, valued at the sum of twelve thousand dollars. The interest of James S. Marsh and E. C. Marsh, defendants, we value at twelve thousand dollars.

Given under our hands this sixteenth day of January, A. D. 1878.

R. V. BLACK, *Sheriff.*
AUGUSTUS MOORE.
BEN. B. THOMPSON.

I hereby certify that the above-named Augustus Moore and Ben. B. Thompson are freeholders and residents of said Nemaha County, and they were by me duly summoned and sworn to make the appraisement as above set forth, on the day and year last above written.

R. V. BLACK, *Sheriff.*

(On the back of which is the following endorsement, to wit:) Filed the 18th day of January, A. D. 1878. William H. Hoover, cl'k.

EXHIBIT A.

The inventory and appraisement marked "A," and referred to in sheriff's return, reads in words and figures following, to wit:

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

In the district court of Nemaha County, State of Nebraska.

Inventory of property attached.

33 We, Richmond V. Black, sheriff of said county of Nemaha, and Augustus Moore and Ben B. Thompson, two disinterested freeholders of said county, the said Augustus Moore and Ben B. Thompson, being first duly sworn, do truly inventory and appraise the following property attached as the property of the defendants James S. Marsh and E. C. Marsh, on an order of attachment issued in a case of John McPherson, of Brownville, Nebraska, plaintiff, against the said James S. Marsh and E. C. Marsh, defendants, now pending in the district court of the said county of Nemaha, and described as follows, to wit:

17	yds.	drilling, 9½				1	64
11	"	blue flannel, 35				3	85
15½	"	cassimere, 1.00				15	50
15½	"	opera flannel, 40				6	20
11	"	check	"	40		4	40
10¾	"	"	"	40		4	30
34	"	white	"	30		10	20
24¾	"	"	"	21		5	19
16½	"	gray	"	42		6	60
7	"	cassimere, 6¼, 1.50				10	50
12	"	gray cassimere, 1.00				12	00
4	"	stripe	"	1.10		4	40
10	"	Irish linen, 50				5	00
12	"	"	"	40		4	80
7½	"	"	"	50		3	75
						98	33
		Amount brought over				98	33
15	yd'.	Hamburg edging, 14				2	10
13½	"	"	"	14		1	85
1		silk neck-tie					50
1		pr. shears					20

	1 nubia	1 00
34	11 p'rs Balmoral hose	2 20
	26 yds. Irish linen, 37½	9 94
27½	" domestic, 7½	2 06
6½ yds.	ribbon	1 30
16½ "	alpacca, 22½	3 71
1 trunk		8 00
		$131 19

All done in Nemaha County, State of Nebraska, this 16th day of January, A. D. 1878.

RICHMOND V. BLACK,
Sheriff.
AUGUSTUS MOORE.
BEN B. THOMPSON.

The inventory and appraisment marked "B" reads in words and figures following, to wit:

EXHIBIT B.

In the district court of Nemaha County, State of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

Inventory of property attached.

We, Richmond V. Black, sheriff of said county of Nemaha, and Augustus Moore and Ben B. Thompson, two disinterested freeholders of said county, the said Augustus Moore and Ben B. Thompson, being first duly sworn, do truly inventory and appraise the following property, attached as the property of the defendants James S. Marsh and M. C. Marsh, on an order of attachment in a case of John McPherson, of Brownville, Nemaha County, plaintiff, against the said James S. Marsh and E. C. Marsh, defendants, now pending in the district court of the said county of Nemaha, and described as follows, to wit:

3 harvesters	330 00
	$330 00

All done in Nemaha County, State of Nebraska, this 16th day
35 of January, A. D. 1878.

RICHMOND V. BLACK,
Sheriff.
AUGUSTUS MOORE.
BEN B. THOMPSON.

The schedule referred to in sheriff's return reads in words and figures following, to wit:

SCHEDULE.—*Inventory.*

1 p's, 12½ yds.	bro. muslin, 8c	1 00
76 " 1,289 "	calico, 5½	70 89
11 " 182¼ "	percales, 9½	13 67

1	" 5¼	" prints, 5½		29
1	" 30	" all wool delain, 30		9 00
1	" 35	" Pacific " 18c		6 30
1	" 41½	" blue flannel, 35		14 53
1	" 16⅓	" " " 30		4 90
1	" 15	" red " 32		4 80
1	" 8¼	" plaid " 25		2 06
1	" 8½	" " " 30		2 55
1	" 2½	" water-proof stripe, 80		2 00
2	" 16¼	" im. Scotch sashmere, 1.10		17 38
1	" 7	" " " " 1.50		10 50
1	" 7	" " " " 1.75		12 25
1	" 5	" " " " 1.00		5 00
1	" 3¼	" " " " 1.50		4 88
1	" 3¾	" " " " 1.00		3 75
1	" 5½	" " " " 40		2 20
1	" 15	" Turkey table linen, 60		9 00
1	" 5½	" Tur. " " 50		2 75
"	" 21	" " " 40		8 40
2	" 36½	" lot crash, 8		2 92
2	" 14	" " " 8		1 12
1	" 30	" bro. corst jeans, 9		2 85
	1 " 30	" bl'k silisia, 10		3 00
36	1 " 10½	" farmers' satin, 35		3 68
	1 bl'k silk parasol			1 00
3	" cotton	" 20		60
22	gent's vests, 1.00			22 00
	Amount forward			245 76
	Amount brought forward			245 76
6	boys' vests, 85			5 10
2	" coats, 2.00			4 00
2	gent's cass. Scotch, 6.00			12 00
2	" " 4.00			8 00
1	" "			5 00
1	grey sat. coat			3 50
1	" " "			4 00
1	light cass. coat			6 00
1	" " "			6 50
1	" " "			5 00
1	"			3 50
1	pr. "			3 50
1	pr. jeans pants			60
1	" vest			1 00
5	" doeskin pants, 6.00			30 00
5	" " " 5.00			25 00
3	" " " 3.50			10 50
1	French worsted coat			8 50
2	bl'k cloth " 10.00			20 00
3	" " " 9.00			27 00
2	" vests, 2.00			4 00
1	"			1 00
	1 ps., 9 yd's, curtain lace, 25			2 25
37	5 " 59 "	all wool delain, 22		12 98
	4 " 95½ "	gingham, 20		10 10

5	" 106 "	grass cloth, 6½	6 89
3	" 18 "	" " 8	1 44
1	" 29 "	buff French lawn, 10	2 90
3	" 37 "	linen dress goods, 18	6 66
3	" 104 "	Pacific poplin, 18	18 72
1	31 "	Merrimac print, 7	2 17
		18	
1	27 "	Gloucester ging., 9²	2 56
1	11½ "	plaid shirting, 15	1 73
1	41²	Hamilton delain, 8	3 32
2	shoulder shawls, 50		1 00
1	felt skirt		85
2	ps., 32 yds. grey poplin, 8		2 56
2	15 "	tarlaton, 20	3 00
2	" 90¾ "	plaid dress goods, 35	31 76
1	" 7¾	bl'k & blue plaid flannel, 45	3 48
1	" 31¾	plaid poplin, 20	6 35
1	" 4 "	bl'k alpacca, 35	1 40
7	" 85 "	paper cambric, 6	5 10
17	" 272	" " 5	13 60
3	" 16¾	silisia, 9²	1 59
2	" 16¾	cottonade, 15	2 51
1	" 18½	buckram, 10	1 85
1	" 2¾	canvas, 15	41
1	" 6² "	20	1 30
1	" 11	table linen, 27	2 97
1	" 3	brown, 15	45
1	" 38¼	bro. muslin, 8	3 06

Shoes.

9	pr. men's buff plough shoes, 1.20		10 80
	7 " boys' buckle " " 1.15		8 05
38	2 " " bal. " " 1.00		2 00
	2 " " lined " " 90		1 80
1	" box toed		1 20
1	" women's shoes		1 40
1	" spelt		75
1	" men's Oxford tie		1 00
	Amount forward		629 92
	Amount brought forward		629 29
12	pr. ladies' mixed kinds, 1.00		12 00
8	" misses' shoes, 1.10		8 80
16	" ladies' " 1.15		18 40
51	" children' " 65		33 15
13	" " 75		9 75
18	" misses' 90		16 20
13	" men's plough shoes, 1.50		19 50
5	" boys' " " 1.25		6 25
12	" women's calf " 1.25		15 00
9	" " im. morocco, 1.00		9 00
4	" men & boys' shoes, 1.25		5 00
9	lb. ball cotton, 60		5 40
6	goo. sleeve laces, 20		1 20

1½ " ball cotton, 60		90
9⅞ doz. lead pencils, 15		1 20
1 " carpenter "		60
58 " velvet drop buttons, 8		4 64
50 " silk " " 6		3 00
30 " trimming " 4		1 20
12 " bro. silk " 6		72
26 gro. com. agate, " 10		2 60
5 " pearl " 15		75
1½ " " " " large, 25		38
15 doz. shank agate, 3		45
12 " fancy " 5		60
39 15 " shank " 6		90
1⅔ gr't gross pant " 1.00		1 67
9 doz. steel " 10		90
12 " brass shank " 5		60
42 " rubber coat " 7		2 94
Amount forward		803 62
Amount brought forward		803 62
23 doz. veg. ivory coat buttons, 9		2 07
11 " " " vest " 5		55
5½ " white metal " 10		55
4½ " rub. cloak " 8		38
3 " fancy " 5		15
150 " pearl shirt " 6		9 00
6 bunches wood button molds, 6		1 20
10 doz. safety pins, 10		1 00
1 gro. pant. buttons		75
52 bolts alpacca braid, 4		2 08
60 yds. " " 1²		90
10 lb. carpet chain, 18		1 80
10 rub. round comb', 20		2 00
8 " " " 16		1 28
4 " " d'bl. " 25		1 00
7 " " " 10		70
6 " " " 10		60
2 " " " 5		10
14 tusk horn, 15		2 10
9 doz. bunches wire hair pins, 8		72
27⅛ " assorted spool silk, 75		20 50
8⅓ " spool thread, 60		17 00
3 ps. 45 " wool fringe, 15		6 74
1 doz. lamp mats		75
9 " b'lk mitts, 15		1 35
40 29 hair nets, 5		1 45
4 bl'k beaded belts, 15		60
5 Japanese fans, 20		1 00
1 pr. infant's leggins		20
4 belt buckles, 10		40
Amount forward		882 50
Amount brought forward		882 50
6 jet shawl pins, 12²		75

2	hooks,	3							06
25	balls welting cord,	2							50
10	gents' bows,	10							1 00
5	ladies'	"	15						75
140	bunches or skeins floss thread,	$1\frac{1}{2}$							1 00
2	Madame Foy's corsets,	75							1 50
7	russet wallets,	25							1 75
29	linen h'dk's,	16							2 90
3	lawn h'dk's,	4							12
$\frac{1}{4}$	ream note paper								35
3—3	qr. blank books,	30							90
9	doz. embroidery braid,	50							4 50
71	bunches	"	3						2 13
28	"	"	2						56
45	"	"	5						2 25
10	"	"	10						1 00
18	linen collars, gents,	8							1 40
$14\frac{1}{2}$	yds. cotton edging,	3							43
25	"	"	"	2					50
8	"	"	"	2					16
28	"	"	"	4					1 12
36	"	"	"	$1\frac{1}{2}$					54
48	"	"	"	2					96
15	"	"	"	3					45
	18	"	"	"	4				72
41	36	"	"	"	3				1 06
	20	"	lace	"	12^2				2 50
10	"	"	"	10					1 00
24	yds. lace edging,	6							1 44
7	"	ruffling,	2						14
36	"	lace,	5						1 80
36	"	"	$3\frac{1}{2}$						1 26
24	"	"	4^3						36
28	"	"	$2\frac{1}{2}$						70
10	"	cotton fringe,	3						30
12	"	"	"	5					60
11	"	"	"	4					44
11	yds.	"	"	7					77
8	p's,	$131\frac{1}{2}$	yds.,	"	edging,	2			2 63
7	"	221	"	"	"	1			2 21
5	"	105	"		"	1^2			1 58
2	"	35	"		"	3			1 05
2	"	57	"	"	"	$\frac{1}{2}$			28
1	"	14	"	"	"	5			70
4	"	25	yd' bl'k velvet ribbon,			12^2			3 12
4	"	34^2	"		"	"	15		5 33
3	"	20^2	"		"	"	8		1 64
4	"	18	"		"	"	8		1 44
3	"	18	"		"	"	6		1 08
4	"	42^2	"		"	"	5		2 13
2	"	24	"		"	"	5		1 20
3	"	32	"		"	"	4		1 28
1	"	6	"	bl'k silk fringe,		25			1 50
2	"	34	"	"	gimp,	1			34
4	p's,	$76\frac{3}{4}$	yds.	linen embroidery,		10			1 20
1	"	12	"	lace trim'ing,		5			1 50

	1 " 22^{2} " " " 4		90
42	6 " $46\frac{3}{4}$ " tissue veiling, 30		14 02
	3 " $18\frac{1}{2}$ " " 30		5 55
	Amount forward		964 94
	Amount brought forward		964 94
1	p's, $3\frac{7}{8}$ yds. Hamburg edging, 3		12
$\frac{7}{8}$	" " " 15		13
2^{2}	" " " 12		75
$15\frac{1}{2}$	" " insertion, 4		62
$12\frac{1}{4}$	" " 2		24
$16\frac{1}{2}$	" " edging, 12^{2}		2 06
$14\frac{1}{2}$	" " " 10		1 45
18	" " " 10		1 80
$9\frac{3}{4}$	" " " 9		88
17	" bro' muslin " 8		1 36
20	boxes gent's pa' collars, 10		2 00
15	" " " " 5		75
1	pap' blank book		10
2	" " " 3		06
4	metal-back combs, 10		40
6	horn red " 5		30
7	" " " 7		49
8	" " " 6		48
8	rub' " " 15		1 20
14	" metal-back " 7		98
6	" " " 5		30
4	horn fine " 5		20
7	" " " 6		42
7	" " " 6		42
15	ivory " " 14		2 10
11	horn " " 8		88
9	" " " 4		36
4	rub' " " 6^{2}		26
11	" " " 4		44
43	Amount forward		986 62
	Amount brought forward		986 62
5	rub' fine combs, 8		40
13	pocket " 5		65
9	rub' red " 14		1 26
11	" " " 10		1 10
4	tuck " 20		80
7	rub' round " 16		1 12
5	p'rs 38 garter web, 6		2 28
2	lace bibs, 30		60
2	" collars, 50		1 00
2	" " 20		40
9	" " 25		2 25
5	ladies' bows, 15		75
11^{2}	doz. thimbles, 10		1 15
4	y'd' collarette, 7		28
8	tooth brushes, 10		80
$4\frac{1}{2}$	yds. collarette, 20		90

5^2 " " 20		1 10
8^2 " red ging', 3		25
18 gent's silk ties, 20		3 60
5 " fancy " 40		2 00
15 collar-buttons, 1		15
5 sets studs, 15		75
7 collar-buttons, 5		35
7 shirt-studs, 5		35
7 bosom-pins, 5		35
2^2 doz. buttons, 20		50
2 glove-stretchers, 50		1 00
7 silk ties, 40		2 80
1 " "		30
4 " " 25		1 00
Amount forward		1,016 06
44 Amount brought forward		1,016 06
8 silk ties, 35		2 80
1 p'r kid gloves		50
2 silk h'dk'fs, 35		70
6 " ties, 25		1 50
6 " " 35		2 10
3 p's rub' tape-cord, 25		75
3 p'r linen pants, 1.00		3 00
4 " " " 60		2 40
18 linen coats, 1.00		18 00
$20\frac{3}{4}$ doz. spool' thread, 60		12 45
14 p's, 60 yds., narrow col. ribbon, 2		1 20
4 " $15\frac{3}{4}$ " " " " 5		79
6 " $51\frac{3}{4}$ " " " 5		2 58
5 " 38 " " " 6		2 31
6 " 39 " " " 5		1 95
6 " 15^2 " " " 4		62
5 " $49\frac{1}{4}$ " " " 10		4 93
4 " $34\frac{3}{4}$ " " " 8		2 78
4 " $21\frac{1}{2}$ " cardinal " 12^2		2 69
3 " 28 " " " 6		1 68
9 " 53 " a'sorted col. " 4		2 12
5 " 24 " " " 5		1 20
7 " 28 " " " 6		1 68
6 " 36 " " 10		3 60
3 " 13 " fancy neck ribbons, 15		1 95
5 " 41 " sash " 20		8 20
5 " $30\frac{1}{4}$ " " " 25		7 56
1 " tissue veiling		25
3 p's 55 " curtain Holland, 12^2		6 88
4 Panama hats, 50		2 00
4 dark 20		80
18 straw 8		1 20
45 2 open straw, 70		1 40
7 " 12^2		87
5 " 15		75
13 boys & infants, 30		6 90
1 doz. corsets, 7.00		6 00
$1\frac{1}{4}$ " " 3.00		8 75

¼	"	"			75
14	boxes paper collars.	12			1 68
7	linen	"	10		70
5	p'r ladies' cuffs,	10			50
13	"	linen collars,	lot		90
10	gent's	"	" 10		1 00
10	ladies' bows,	20			2 00
6	gent's cotton bows,	3			18
4	"	silk fancy bows,	15		60
4	p'r suspenders,	10			40
7	"	"	25		1 75
7	"	"	25		1 75
5	"	"	50		2 50
14	"	ladies' collars,	8		1 12
4	lots cuffs and collars,	15			60
33¾	doz. spool thread,	50			16 88
6⅔	"	"	silk, 50		3 33
1¼	"	"	twist lot		25
5⅛	"	neck pins,	40		2 13
6	p'rs child's mitts,	15			90
11	"	ladies' gloves,	16		1 76
6	"	"	" 15		90
11	"	"	" 18		1 98
		Amount forward			1,187 53
		Amount brought forward			1,187 53
	3	ladies gloves,	16		1 76
46	11	"	" 15		1 65
	6	"	" 15		90
7	"	"	12²		87
10	"	"	15		1 05
7	"	"	15		1 05
9	"	"	10		90
4	"	"	25		1 00
11	"	"	15		1 65
9	l. kid gloves,	40			3 60
5	p'r ladies' bl'k silk gloves,	25			1 25
13	"	cotton gloves,	5		65
4	"	gent's kids,	50		2 00
22	corset stays,	6			1 32
19	ladies' belts,	5			95
1	doz. lawn h'd'k				50
6	linen	"	20		1 20
6	"	"	10		60
1	"	"			40
6	"	"	15		90
97	bolts alpacca braid,	4			3 88
7	"	"	15		1 05
36	yds.	"	1		36
1	doz. red	"			25
5	packs envelopes,	6			30
71	pen holders				25
6	p'r boy's suspenders,	10			60
9	"	pulse warmers,	12²		1 13

7 " men's wool ½ hose, 25		1 75
6 " cot. " 10		60
Amount forward	1,222 35	
Amount brought forward	1,222 35	
6 p'r ladies' cot. hose, 15		90
6 " " mixed " 15		90
47 6 " " white " 7		42
10 " gent's cashmere, 25		2 50
10 " ladies' white cot. hose, 10		1 00
14 " " bl'k hose 10		1 40
13 " boy's cot. ½ " 7		91
9 " ladies' " 12²		1 12
3 " " " 15		45
7 " " " 12²		88
10 " " " 10		1 00
9 " " " 20		1 60
15 " misses striped I "		2 25
16 " " fancy " 15		2 40
17 " " " 12²		2 13
22 " " 10		2 20
27 " " 12²		3 37
15 " " 15		2 25
16 " misses plain wool, 20		3 20
21 " " fancy hose, 10		2 10
5 " " " " 20		1 00
24 " " " " 7		1 68
7 " ladies " " 20		1 40
14 " children's assorted, 8		1 12
7 " misses fancy, 12²		87
2 " " " 15		30
5 " " " 10		50
15 " children white hose, 8		1 20
24 " misses fleeced lined, 10		2 40
12 " ladies' cot. hose, 12²		1 50
Amount forward	1,267 30	
Amount brought forward	1,267 30	
22 p'r children's hose, 15²		1 10
9 " ladies' " 12²		1 15
48 4 " " 12²		50
4 " " 10		40
33 " children 5		1 65
9 " ladies' wool hose, 15		1 35
7 " " " 20		1 40
8 " " cot. " 12²		1 00
12 " men's ½ " 10		1 20
5 " ladies' merino " 15		75
8 " l. col'd " 15		1 20
6 " " fleeced lined, 15		90
9 " men's " 15		1 35
9 " " cot. " 15		1 35
6 " " mixed damage shirts, 75		4 50
4 knit mixed shirts, 35		1 40

7 shirts & drawers, 25	1 75
1 wool scarf	35
1,975 cigars, Henry Clay, @ 4.00 per 100	39 00
1,000 " no brand, 4.00	40 00
1 thread case	3 00
	1,372 58

Afterwards, to wit, on the 7th day of February, 1878, the defendants appearance was filed in said cause, which reads in words and figures following, to wit:

Defendants' appearance.

In the district court in and for Nemaha County, Nebraska.

JOHN MCPHERSON, PL'FF, vs. JAMES S. MARSH AND E. C. MARSH, DEF'TS. } Appearance of defendants.

49 Now comes the defendants, James S. Marsh and E. C. Marsh, and enter this their appearance in the above-entitled cause, and waive the issuing or service of a summons or any further notice herein, as effectually as if personal service of a summons had been made on each of them Jan. 17th, A. D. 1878.

J. E. DOON,
Att'y in Fact for Defendants.

(On the back of which is the following endorsement, to wit:) Filed February 7, 1878. William H. Hoover, cl'k.

Afterwards, to wit, on the 16th day of February, 1878, a motion to make petition more definite was filed in said cause, which reads in words and figures following, to wit:

Motion to make petition more definite.

In the district court of Nemaha County, Nebraska.

JOHN MCPHERSON, PLAINTIFF, vs. JAMES S. MARSH AND E. C. MARSH, DEFENDants. } Motion.

Now come defendants, and move the court to compel plaintiff to make his petition more perfect, complete, conformable to the statute, and more certain, specific and definite, as follows:

1st. By attaching a copy of the written contract, dated November 5, 1877, expressly pleaded and stated in the petition, but of which the petition fails to give a copy.

2nd. By stating the amount of the incumbrances and liens on ea'h of said machines at the several places therein named, and what the said incumbrances and liens are for, and how much is for storage, how much for freight, and how much for agent's liens and how much for other liens, and how much for commissions due agents, and how many were in bad condition from exposure and age, and where the

same are, and how many are incomplete and how incomplete, and where such incomplete ones are, and how much the damage each by reason of said exposure, age and incompleteness and liens, incumbrances and charges, and how many of said places were there not the number of said machines named in the contract, and name such places.

3. By specifying how much less than twenty-five dollars, was the freight on each of said machines, and how much was the freight on each of said machines?

J. H. BROADY,
Att'y for Defendants.

(On the back of which is the following endorsement, to wit:) Filed February 16, 1878. William H. Hoover, cl'k.

On the same day, to wit, on the 16th day of February, A. D. 1878, a motion to strike out was filed in said cause, which reads in words and figures following, to wit:

Motion to strike out.

In the district court of Nemaha County, Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS. } Motion.

Now come the defendants, and move the courts to strike out of the petition each of the following extracts therefrom:

1st. Commencing with the words, "That at the date of the execution,"

[**Note.*—1*st. Commencing with the words, "That at the date of the execution,"*

on the 20th line of the 7th page of said petition, and continuing
on the 23rd line of the 4th page of this transcript, and continuing

to and including the words, "said agreement in writing," on the 10th
to and including the words, "said agreement in writing," on the 10*th*

line of the 8th page of said petition.
line of the 5th page of this transcript.

WILLIAM HO. HOOVER, Cl'k.

2nd. Commencing with the words, "That about the 5th day of No-
Note.—2nd. Commencing with the words, "That about the 5th day

vember, 1877," on the 10th and 11th lines of the 8th page, and
of November, 1877," *on the* 10*th and* 11*th lines of the 5th page of this transcript,*

continuing up to and including the words, "more fully set forth," on
continuing up to and including the words, "more fully set forth," on

* Red ink interlineations in original printed in italic.

51 the 13th line of the 9th page.
the 28th line of the 5th page of this transcript.
WILLIAM H. HOOVER, Clk.

3rd. Commencing with the words, "That at said time," on the 14th line,
Note.—3rd. Commencing with the words, "That at said time," on the 29th line,

of the 9th page, and continuing up to and including the words, "To
of the 5th page, and continuing up to and including the words, "To

said defendants," on the second line of the 10' page. This motion is
said defendants," on the 7th line, on the 6th page of this transcript.
WILLIAM H. HOOVER, Clk.

made because said extracts are surplusage, incompetent and immaterial.

J. H. BROADY,
Att'y for Defendants.

(On the back of which is the following endorsement, to wit:) Filed February 16, 187 . William H. Hoover, cl'k.

On the same day, to wit, on the 16th day of February, A. D. 1878, a motion to discharge attachment was filed in said cause, which reads in words and figures following, to wit:

Motion to discharge attachment.

In the district court of Nemaha County, Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS. } Motion to discharge the attachment.

Now come the defendants, and move the court to discharge all the attachments herein, as to all the property attached, or claimed to be attached, because the petition and affidavit for attachment herein show on their face that this action is founded on alleged fraudulent representations and tort and that attachment does not lie, and cannot be issued according to law, in this case, and also because there is no undertaking for attachment herein. And defendants further move the court to discharge the attachment herein, as to the property pretended to be attached in Johnson County, because the record herein shows that there was no attachment of said last-named property according to law, and that the sheriff of said Johnson County did not in the
52 presence of two residents of the county declare that by virtue of said order he attaches said property at the suit of such plaintiff, and the sheriff did not attach said last-named property, and does not in his return say he did.

J. H. BROADY,
Attorney for Defendant.

(On the back of which is the following endorsement, to wit:) Filed February 16, 1878. William H. Hoover, cl'k.

Afterwards, to wit, on the 18th day of March, A. D. 1878, a petition for removal of cause to U. S. circuit court was filed in said cause, which reads in words and figures following, to wit:

Petition for removal of cause to U. S. cir. c't.

In the district court of Nemaha County, State of Nebraska.

JOHN MCPHERSON, PLAINTIFF, *vs.* JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.	Petition for removal to the circuit court of the United States, district of Nebraska.

To the said district court:

Your petitioners, the said defendants, respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that these petitioners were, each and both, at the time of the commencement of this suit and still are, citizens of the State of Pennsylvania, and that said plaintiff, John McPherson, was then, and still is, a citizen of the State of Nebraska.

And your petitioner offer herewith a bond with good and sufficient surety for his entering in said circuit court of the United States
53 on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And they pray this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the district of Nebraska, and they will ever pray.

J. H. BROADY,
Attorney for Defendants.

STATE OF NEBRASKA, *County of Nemaha, ss.*:

I, J. H. Broady, being duly sworn, say that I am attorney for the petitioners in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

J. H. BROADY.

Subscribed by the said J. H. Broady in my presence, and by him sworn to before me this 18th day of March, A. D. 1878.

WILLIAM H. HOOVER, *Cl'k.*

(On the back of which is the following endorsement, to wit:) Filed March 18th, 1878. William H. Hoover, cl'k.

Bond for removal of cause to U. S. circuit c't.

On the same day, to wit, on the 18th day of March, A. D. 1878, a bond for removal of cause to U. S. circuit court was filed in said cause, which reads in words and figures following, to wit:

Know all men by these presents that we, James S. Marsh, and E. C. Marsh, as principals, and Joseph O'Pelt as surety, are held and firmly bound unto John McPherson in the penal sum of two hundred dollars, the payment whereof well and truly to be made unto the said John McPherson, his heirs and assigns, we bind ourselves, our heirs,
54 representatives, and assignees, jointly and severally, firmly by these presents.

Yet, upon these conditions: The said James S. Marsh and E. C. Marsh, having petitioned the district court of Nemaha County, State of Nebraska, for the removal of a certain cause therein pending, wherein John McPherson is plaintiff, and James S. Marsh and E. C. Marsh are defendants, to the circuit court of the United States in and for the district of Nebraska.

Now, if the said James S. Marsh and E. C. Marsh, your petitioners, shall enter in the said circuit court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 18' day of March, A. D. 1878.

[SEAL.] JAMES S. MARSH AND
E. C. MARSH,
By J. H. BROADY,
Their Attorney.
JOS. OPELT.

The above bond taken by me and surety approved by me as good and sufficient, this 18th day of March, 1878.

WILLIAM H. HOOVER, *Clk.*

(On the back of which is the following endorsement, to wit:) Filed March 18, 1878. William H. Hoover, cl'k.

Journal entry.

Afterwards, to wit, at a term of the distict court in and for Nemaha County, in the second judicial district of the State of Nebraska, begun and held at the court-house in Brownville, in said county, on Monday, the 18th day of March, A. D. 1878.

Present, Hon. S. B. Pound, judge.

When at said term, to wit, on Monday the 18th day of March, A. D. 1878, it being the 1st day of said term, the following proceedings were had and done in said cause, to wit:

55 JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH, } # 1098.

Now on this 18th day of March, A. D. 1878, comes the defendant herein by Jefferson H. Broady, esq., his attorney, and filed his petition for the removal of this case to the circuit court of the United States, and having now offered good and sufficient surety, pursuant to the statute, therefore the court finding that the defendant is a resident of the State of Pennsylvania, and that he is entitled to such removal, do hereby accept said surety, and order that said cause be removed for trial

into the next circuit court of the United States, for the district of Nebraska, pursuant to the statutes of the United States, and all further proceedings in this court in the said cause are hereby stayed.

THE STATE OF NEBRASKA,
County of Nemaha, ss:

I, William H. Hoover, clerk of the district court of the 2nd judicial district in and for Nemaha County, in said State, certify that I have compared the foregoing copies of all the papers and record in the above-entitled cause, with the original papers and record on file in my office, and that the same is a true and correct transcript thereof, and of the whole of said original.

In testimony whereof, I have caused the seal of said court to be affixed at my office, at Brownville, in said county, on this 26th day of March, A. D. 1878.

[SEAL.] WILLIAM H. HOOVER, *Clk.*

(Said transcript is endorsed as follows:) No. 292. D. In the district court of Nemaha County, Nebraska. No. 1098. John McPherson vs. James S. Marsh et al. Transcript. Filed April 15, 1878. Watson B. Smith, clerk.

56 Thereupon, afterwards, at the January term of said U. S. circuit court, on the eighth day of January, 1879, the following proceedings were had in said case as appears of record on folio 178, journal E, of said court.

JOHN MCPHERSON *vs.* JAMES S. MARSH ET AL. } No. 292 D.

On this day this cause came on for hearing on the motion of said plaintiff for an order to sell property attached herein, and was argued to the court by attorneys for the parties herein.

Whereupon, it is ordered by the court, the same being advised in the premises that the sheriff for Nemaha County, Nebraska, surrender to the said William Daily, marshal of this district, the goods now in his hands formerly attached herein, taking the receipt of said marshal therefor, and filing same with the clerk of this court.

The marshal of this district is ordered to advertise and sell said goods as though on execution, and hold the proceeds arising from said sale subject to the order of this court; case continued.

Thereupon, afterwards, on the 28th day of March, 1879, an alias attachment was returned and filed in said case which is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON *vs.* JAMES S. MARSH AND E. C. MARSH. } No. 292 D.

DISTRICT OF NEBRASKA, *ss:*

The President of the United States of America, to the marshal of the district of Nebraska, greeting:

57 You are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, or interest in stocks, rights,

credits, moneys, and effects of the above-named defendant in your county, not exempt by law from being applied to the payment of the above-named plaintiff's claim or so much thereof as will satisfy the said plaintiff's claim for ($23,237.00) twenty-three thousand two hundred, thirty-seven dollars, and fifty dollars the probable costs of this action.

You will make due return of this order on the 15th day of April, A. D. 1879.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of March, A. D. 1879, and in the 103rd year of the Independence of the United States of America.

[SEAL.] WATSON B. SMITH, *Clerk.*

Attached to said alias attachment is an appraisement and return of the marshal in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Nebraska, ss:

We, the undersigned, William Daily, U. S. marshal, district of Nebraska, by Ellis L. Bierbower, deputy, and E. M. Lipsey and George Bartram, two residents of Lancaster County, State and district of Nebraska, the said residents having been duly sworn by said marshal to make a true inventory and appraisement of certain personal property by him attached by virtue of a writ of attachment issued in a case pending in the circuit court of the United States for the district of Nebraska, wherein John McPherson is plaintiff, and James S. Marsh et al., are defendants, and upon careful examination of the property hereinafter described, do appraise and inventory the same, viz: Eleven Marsh harvesters
58 (condition medium), at the sum of seventy-five dollars each. Total: Eight hundred and twenty-five dollars ($825.00).

Dated at Lincoln, March 28th, 1879.

WILLIAM DAILY, *U. S. Marshal.*
By ELLIS L. BIERBOWER, *Deputy.*
E. M. LIPSEY,
GEORGE BARTRAM.

Fees 50 cts. each, paid appraisers.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this writ March 26th, 1879, and on the 28th day of March, 1879, I did, in the presence of E. M. Lipsey and George Bartram, two residents of Lancaster County in said district, levy this writ of attachment upon the following described personal property in said Lancaster County, State and district of Nebraska, to wit: Eleven Marsh harvesters. And I further certify, that on same day and date I summoned the aforesaid E. M. Lipsey and George Bartram, residents as aforesaid, and appraised the said property, which said appraisement is hereto attached and made a part of this return.

Said property was taken as the property of the within named defendants.

WILLIAM DAILY, *U. S. Marshal.*
By ELLIS L. BIERBOWER, *Deputy.*

Mar. costs, $4.00.

(Said alias attachment is endorsed as follows:) No. 92, Doc. D. United States circuit court, district of Nebraska. John McPherson vs.

James S. Marsh et al. Alias attachment. Returned and filed Mar. 28, 1879. Watson B. Smith, clerk. Webster and Gaylord, plaintiff's attorney.

59 Thereupon, afterwards, on the 31st day of March, 1879, a copy of the order to sell attached property entered by said court on the eighth day of January, 1879, was returned by the U. S. marshal with his return of service attached thereto in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this order January 23rd, 1879, and in accordance with the command thereof, I proceeded to advertise the property herein referred to (a proof of said advertisement is hereto attached and made a part of this return), and on the day and date advertised I proceeded to sell the said property, and realized from the same the sum of eight hundred and twenty-four $\frac{29}{100}$ dollars, and hold the same subject to the order of court.

WILLIAM DAILY, *U. S. Marshal.*

60 Thereupon afterwards, to wit, on the 23d day of April, 1879, an answer was filed in said case, which said answer is in words and figures following, to wit:

Answer.

In the circuit court of the United States, for the district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

Defendants admits the execution of the contract dated October 16th, 1877, set out in full in the petition.

That the said contract dated October 16th, 1877, was fully executed, fulfilled, superceeded, and dispensed with by the further agreement between the parties duly executed and endorsed thereon in these words, to wit:

"BROWNVILLE, NEBRASKA, *November 5th*, 1877.

"The above contract is this day executed by the said parties thereto as follows: The within-named real estate is conveyed by said first party (McPherson) to said second parties (Marsh and Marsh) also one-half of said stock of goods at an invoice in the sum of four thousand and two hundred and forty-three and $\frac{10}{100}$ dollars making price of the half, four thousand two hundred and forty-three and $\frac{10}{100}$ ($4,243.10) dollars, is delivered by McPherson to said parties Marsh and Marsh.

"The said second parties Marsh and Marsh hereby acknowledge payment of all said machines named in the list within named, aggregating eighty-six number ones, twenty number twos, and hereby deliver all thereof to said first party at the places named in said within list (except there is two instead of one at Donnebrog and three instead of four at Wahoo, which change is consented to by the parties) free
61 and clear of all liens, charges, or taxes up to and including taxes

for the year 1878, as per within contract. Said second parties also hereby deliver to said first party eleven of said machines within named, called Marsh number four, as provided for within and on the within-named terms therefor at Beatrice. On this, eleven machines number four, there is two hundred and seventy-five dollars freight in favor of said second parties, to whom said first party shall account therefor as hereinafter stated.

"The balance of $259.63 on the said list of number ones and number twos, and the said eleven number fours, amounting to $1,925.00 is applied on the purchase price of said lands in Sonora Island, leaving balance of $1,415.37, for which said second parties shall deliver as provided for within, eight of said machines number four, on board the cars in Pennsylvania, at place within named, leaving still a balance on said purchase price of island real estate of $15.37 in favor of said first party to whom the second parties shall account. As soon as the amount due said first party on freights of said number ones and twos are ascertained, the same with the said $275.00 due second parties and said $15.37 due said first party shall be settled and adjusted by the parties. Said eight number fours to be delivered within thirty days after notice to second parties. Said second parties hereby warrant that said eighty-six number ones and twenty number twos and eleven number fours are now at the places above-named in condition for delivery as above and within provided for, and that said eight number fours shall be delivered as above stated and shall stand good to said first party for any breaches or failures of such warranty and promise.

"On said store goods one thousand dollars is paid to said first party the receipt of which is hereby acknowledged and the balance shall be paid according to the within contract.

62 "JOHN McPHERSON.
"JAMES S. MARSH.
"E. C. MARSH."

On the said contract the following agreement was endorsed by plaintiff, to wit:

"Received of said second parties, Marsh and Marsh in full payment and settlement of said balance due for said store goods, after said payment of one thousand dollars, the following described notes of this date made by James S. Marsh to my order, to wit, one for $1,056.44, one for $915.72, one for $685.47, and one for $585.47, in all four several promissory notes for said amounts, all due December 1, 1877, with interest at ten per cent. per annum after maturity.

"November 7, 1877.

"JOHN McPHERSON.

"Witness:
"WILLIAM H. HOOVER."

The foregoing agreements dated November 5, 1877, and November 7, 1877, were both one contract made and delivered together at one and the same time on the seventh day of November, 1877, after they were both signed and their making and delivery were parts of one and the same transaction in which the deed to real estate from plaintiff to defendants mentioned in the petition was executed and the execution of the said deed is a part of the same transaction last aforesaid.

The defendants aver that they duly performed all the conditions of said contracts on their parts to be performed and admit that plaintiff

conveyed the real estate and one-half stock of goods described in the petition to defendants. But allege that of the said amount, so paid for goods as stated in said agreement dated November 5th, 1877,
63 eleven hundred dollars were for cigars which constituted a part of the said goods, which cigars were sold as of the following brands and as composed of the following material, to wit:

Fruits & flowers, Havana filler and Connecticut wrapper & binder	3,000
Flora Del Fuma, Havana filler & Connecticut wrapper & binder	7,400
Governor's choice, Havana filler & Connecticut wrapper & binder	4,300
Henry Clay, Havana filler & Connecticut wrapper & binder	3,700
McPherson's best, Yara filler & Connecticut wrapper & binder	1,650
Just out, clear Connecticut	5,500
Gold medal, clear Connecticut	4,500
Gems, clear Connecticut	900
Nebraska pets, clear Connecticut	3,100

And by the said plaintiff at the time represented and warranted to be of the grade above named and the prices for such grades of cigars as above given were given in said trade for the said cigars. That the said cigars were not of the grade above named and none of them were of clear Havana filling, but on the contrary all the above cigars represented as of clear Havana filling, the fillings were as much as half seed filling, which seed filling is of a greatly inferior material to Havana filling.

That by reason of the said filling of seed tobacco instead of Havana tobacco, the said cigars were not worth one-half what they would have been worth had they come up to the said brands and to said representation of plaintiff, all of which plaintiff then well knew. Defendants relying and believing said brands were what they were represented to be, and that said representations were true, was thereby induced
64 to purchase the same in said trade for eleven hundred dollars, and was thereby damaged and injured in the sum of five hundred and fifty dollars.

Defendants deny each and every allegation contained in the petition which is not expressly admitted in this answer.

Defendants aver that the said transactions between plaintiff and defendants were neither sales of the said plaintiff's lands and goods nor sales of defendants' machines, but were barters of the property of one in exchange for the property of the others, in which the prices fixed were largely in excess of cash prices, so much so that neither would have bought the property of the other for cash at such prices, and that the naming of prices in the transaction was nothing more than a matter of convenience in executing the exchange.

Defendants further say that of the said eight Marsh No. four reapers and mowers to be delivered as aforesaid on board the cars at Lewisburg, Pennsylvania, the plaintiff has received of defendants three thereof, and has wholly failed, refused, and neglected to order, as provided in said agreement of November 5th, 1877, any more thereof, and the defendants have always stood ready, willing, and anxious to fill any order therefor that plaintiff might make pursuant to said agreement of November 5th, 1877, and ready and willing and anxious to comply with all the terms of said contract of November 5th, 1877, and held the said

machines always in readiness therefor, and still hold them in readiness, and hereby offer the same when ordered as in said contract specified.

Defendants admit that after the making of said agreement in November, 1877, defendants told plaintiff that they (the defendants) would visit each of the points named in said writing where said machines then were, and at which places they were delivered as stated in
65 said writing, and if any agents were not settled with, or any liens or charges were claimed against any of said machines, would make settlement with their said agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all unpaid claims and liens of any *of every* kind and sort upon each and all of said machines, and put in good repair each and all of the said machines, so as to have the same conform to the conditions of said machines; so as to have the same conform to the conditions of said agreement and warranty in writing, but deny that they ever so stated until after said writing of November, 1877, or that they told plaintiff that they would do so at once, but aver that they stated that they would do so in a reasonable time to have them so repaired and in good condition for the first season and time for selling reapers and mowers; which season, defendants aver, was the latter part of the spring 1878, continuing from thence through the summer of 1878, and aver that said promise was to so repair and fit up said reapers and mowers ready for the harvest of small grains in the year 1878, and for the sales for such harvest, which time commenced about May, 1878, and continued during such harvest; all of which was agreed to between the parties hereto as satisfactory, as making good the warranty of defendants in said agreement dated November 5th, 1877, all of which said promises these defendants have fully performed and complied with, and have previous to said time and previous to the commencement of the reaper and mower trade for 1878, and previous to April, 1878, visited each of the points named in said writing, dated October 6th, 1877, where said machines then were, and made settlements with their agents then and there having charge of said agricultural machines, where settlements had not already and heretofore been made with such agents, and paid off and discharged all claims and liens of every kind and sort upon each and all of said machines, and put in good condition and
66 repair each and all of said machines, wherever any such claims or liens were unpaid and wherever any of said machines were not in good condition or were out of repair, and had all said machines as aforesaid discharged of all claims and liens of any and every sort, and in good repair and condition for the 1878 market, in due time for such market and pursuant to such promise.

The plaintiff has neither paid nor accounted to defendants for the said two hundred and twenty-five dollars, on account of the eleven Marsh number four machines at Beatrice, as named in the above contract, dated November 5th, 1877, nor any part thereof, and there is now due thereon from plaintiff to defendants the said sum of two hundred and seventy-five dollars, with interest at ten per cent. per annum from November 5th, 1877.

These defendants therefore pray judgment against plaintiff for the sum of seven hundred and seventy-five dollars with interest at ten per cent. per annum, from November 5th, 1877, and for costs of suit.

J. H. BROADY,
Att'y for Defendants.

STATE OF NEBRASKA,
County of Nemaha, ss:

I, J. H. Broady, being first duly sworn, say I am attorney for the said defendants who are each and all non-residents of and absent from said State: that the facts stated and allegations in the foregoing answer are true, as I verily believe.

J. H. BROADY.

Subscribed in my presence and sworn to before me, this 22nd day of April, 1879.

[SEAL.] A. R. W. ALISON,
Notary Public.

67 (Said answer is endorsed as follows:) John McPherson vs. James S. Marsh et al. Answer No. 292 D. Filed April 23, 1879.

Watson B. Smith, clerk. J. H. Broady, att'y for def'ts.

Thereupon afterwards, to wit, on the 2nd day of May, 1879, a reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

In the circuit court of the United States, for the district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
against
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

Now comes the said plaintiff and for a reply to the answer of the said defendants filed herein, denies each and every allegation contained in said answer which is not admitted in this his reply.

Plaintiff denies that the contract of October 16, 1877, was superceded or dispensed with by the endorsements thereon of November 5th, 1877, and November 7th, 1877, any further than appears from the face of said endorsements, and denies that the said endorsements and facts contained therein were made or accurred at any other or different time, or in any other or different manner than is stated in said endorsements.

Plaintiff admits that he sold to the said defendants as a part of the stock of goods mentioned in said contract of October 16, 1877, and in the indorsements thereon of November 7, 1877, and November 5, 1877, a certain quantity of cigars, but denies that he made any representations or warranty concerning their quality which were not true, and believed to be true by him at the time.

And denies that there was any express warranty of any kind
68 concerning said cigars. He further says that the said stock of goods so sold to the defendants, was sold for money at an agreed cash value and price and were to be paid for in cash, and said price was settled by the payment of cash and notes of the defendant James S. Marsh, as stated in the indorsement dated November 7, 1877, aforesaid. And the plaintiff alleges that the said pretended claim of defendants for defects in the quality of said cigars is for unliquidated damages, and is not the subject of set-off to the plaintiff's demand, and has no connection with the foundation or subject of the plaintiff's action, and does not constitute a valid counterclaim against the plaintiff's cause of action.

Plaintiff also denies that any agreement was made between him and said defendants after the execution of the indorsements on said contract dated November 5, 1877, respecting the delivery of said machines, or of putting said machines in condition for delivery, or in any other manner modifying or changing the terms and conditions of said indorsement of November 5, 1877, but alleges that said endorsements of November 5, 1877, embodies the last and final agreement on that subject between the plaintiffs and defendants.

He further says that the facts stated in the answer of the defendants alleging a subsequent change of modification of the contract contained in the said indorsement of November 5, 1877, do not constitute any defense to the plaintiff's cause of action.

Wherefore the plaintiff prays a judgment as he has prayed in his petition.

JOHN L. WEBSTER AND T. L. SCHICK,
Atty's for Plaintiff.

STATE OF NEBRASKA, *County of Nemaha, ss:*

John McPherson being duly sworn says he is the plaintiff in
69 the above-named action and that the facts stated in the above reply are true as he verily believes.

JOHN McPHERSON.

Subscribed in my presence and sworn to before me this 29th day of April, A. D. 1879.

[SEAL.] J. S. STUTT, *Co. Judge.*

(Said reply is endorsed as follows:) No. 292 D. John McPherson against James S. Marsh and E. C. Marsh. Reply. Filed May 2, 1879, Watson B. Smith, clerk. John L. Webster, T. L. Schick, atty's for plaintiff.

Thereupon, afterwards, to wit, on the 13th day of May, 1879, a second alias attachment was returned by the U. S. marshal in the said case, which said second alias attachment and the returns and papers attached thereto are in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska

JOHN McPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

DISTRICT OF NEBRASKA, *ss:*

The President of the United States of America, to the marshal of the district of Nebraska, greeting:

You are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, or interest in stocks, rights credits, moneys and effects of the above-named defendant in your district not exempt by law from being applied to the payment of the above-named plaintiff's claim, or so much thereof as will satisfy the said plaintiff's claim, for ($23,237.00) twenty-three thousand two hundred thirty-seven dollars, and fifty dollars the probable costs of this action.

76 You will make due return of this order on the 13th day of May, A. D. 1879.

Witness, the honorable Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States, this 23rd day of April, A. D. 1879, and in the 103rd year of the Independence of the United States of America.

[SEAL.] WATSON B. SMITH, *Clerk.*

Appraisement.

In the circuit court of the United States for the district of Nebraska

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, and John D. Seaman and Robert R. Green two disinterested freeholders, residents of Buffalo County, State and district of Nebraska, the said freeholders being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an execution issued out of the circuit court of the United States in the above entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh et al., are defendants, do, upon our oaths, inventory and appraise said property to-wit: seven Valley Chief combined reapers and mowers at $50.00, each, $350.00.

Given under hands this 24th day of April, 1879.

WILLIAM DAILY,
Marshal of the United States for the district of Nebraska.
JOHN D. SEAMAN
ROBERT R. GREEN.

In the circuit court of the United States for the district of Nebraska

71 *Appraisement.*

JOHN MCPHERSON
vs.
JAS. S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, and John Stabler and John Shierman, two residents of Adams County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true *and* inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above entitled cause, and wherein John McPherson is plaintiff, and James S. Marshet al. are defendants, do, upon our oaths, inventory and appraise said property to-wit:

Seventeen Valley Chief No. 1, combined reaper and mower at $40.00 each, $680.00.

Given under our hands this 24th day of April, 1879.

WILLIAM DAILY,
Marshal of the United States for the district of Nebraska.
JOHN STABLER.
JOHN SHIERMAN.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAS. S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, and W. T. Sloan and William Carlin, two residents of Otoe County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above entitled cause, and wherein John McPherson is plaintiff, and Jas. S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property to-wit:

72

One No. 1 Valley Chief combined reaper and mower at $75.00.
Given under our hands this 26th day of April, 1870.

WILLIAM DAILY.
W. T. SLOAN.
WILLIAM CARLIN.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by Wm. Daily and Fred. Sonnershen and Joe. Drahos, two disinterested residents of Cumming County, State and district of Nebraska, the said freeholders being duly sworn by said marshal to make a true and impartial appraisement of the following property levied upon and taken by virtue of an execution issued out of the circuit court of the United States in the above entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh et al. are defendants, do, upon our oaths, appraise said property at its real value in money after deducting all prior liens thereon, to wit:

Five Valley Chief reapers and mowers combined, at $60.00 each—300.00.

Given under our hands this 28th day of April, 1879.

WILLIAM DAILY.
FRED. SONNERSHEN.
JOE. DRAHOS.

In the circuit court of the United States for the district of Nebraska.

73

Appraisement.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, and H. M. Dorsey and J. J. Carpenter, two

disinterested freeholders, residents of Dodge County, State and district of Nebraska; the said freeholders being duly sworn by said marshal to make a true and impartial appraisement of the following property levied upon and taken by virtue of an execution issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh et al. are defendants, do, upon our oaths, appraise said property at its real value, in money, to wit:

Eight Valley Chief combined reaper and mower, at $75.00 each, $600.00.

One machine less, reel doubletree, neck yoke, sickle, &c., at $50.00.

Given under our hands this 28th day of April, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska.
H. M. DORSEY.
J. J. CARPENTER.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by William Daily and H. P. Coolidge and George T. Spooner, two disinterested residents of Platte County, State
74 and district of Nebraska, the said freeholders being duly sworn by said marshal to make a true and impartial appraisement of the following property levied upon and taken by virtue of an execution issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh et al. are defendants, do, upon our oaths, appraise said property at its real value in money after deducting all prior liens thereon, to wit:

Seven Valley Chief combined reapers and mowers in bad condition, at $60.00 each, 420.00.

Given under our hands this 30th day of April, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska.
H. P. COOLIDGE.
GEO. T. SPOONER.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by William Daily and John B. Lowry and Adam Windolph, two disinterested residents of Hall County, State and district of Nebraska, the said freeholders being duly sworn by said mar-

shal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property at its real value in money, to wit:

5 No. 1 combined Valley Chief reapers & mowers at $55.00 each, 270.00.

6 No. 2 combined Valley Chief reapers and mowers, at $45., 270.00—$540.00.

75 Given under our hands this 1st day of May, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska.
JOHN B. LOWRY.
ADAM WINDOLPH.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON }
vs.
J. S. MARSH ET AL. }

The undersigned, William Dailey, marshal of the United States for the district of Nebraska, and M. H. Brown and John W. Swan, two residents of Fil'more County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and J. S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property, to wit:

One Valley Chief combined reaper and mower in fair condition, at $50.00.

One Valley Chief combined reaper and mower in bad condition, imperfect, at 15.00—$65.00.

Given under our hands this 2nd day of May, 1879.

WILLIAM DAILY.
M. H. BROWN.
J. W. SWAN.

In the circuit court of the United States for the district of Nebraska.

76 *Appraisement.*

JOHN MCPHERSON }
vs.
JAMES S. MARSH. }

The undersigned, William Daily, marshal of the United States for the district of Nebraska, and J. A. Harbach and C. Parker, two residents of Douglas County, State, and district of Nebraska, the said residents being duly sworn by said marshal to make a true and impartial appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh are defendants, do, upon our oaths, appraise said property at its real value in money, to wit:

Two No. 1 Combined Valley Chief Reapers and Mowers, at $60.00 each—$120.00.

Given under our hands this 3rd day of May, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska.
JOHN A. HARBACH.
C. PARKER.

Appraisement.

In the circuit court of the United States for *for* the district of Nebraska.

JOHN MCPHERSON }
vs.
J. S. MARSH ET AL. }

The undersigned, William Daily, marshal of the United States for the district of Nebraska, and J. K. Corey, and Frank D. Williams, two residents of Saline County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and J. S. Marsh et al. are defendants, do, upon our oa's, inventory and appraise said property, to wit:

77

Two Valley Chief Combined Reapers and Mowers, at forty-five dollars each, and ninety dollars for the two.

Given under our hands this 12th day of May, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska,
By A. J. WRIGHT, *Deputy.*
J. K. COREY.
FRANK D. WILLIAMS.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON }
vs.
J. S. MARSH ET AL. }

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by A. J. Wright, deputy, and William Wray and Charles Penn, two residents of York County, State, and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and J. S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property, to wit:

1 Combined Valley Chief Reaper and Mower at $45.00.

Given under our hands this 9th day of May, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska,
By A. J. WRIGHT, *Deputy.*
WM. WRAY.
CHARLES PENN.

78 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this writ April 23rd, 1879, and thereupon I did levy the same upon and attach the following-described personal property, as follows:

April 24th, 1879, in Buffalo County, Nebraska, upon seven Valley Chief Combined Reapers and Mowers.

April 24th, 1879, in Adams County, Nebraska, upon seventeen Valley Chief No. 1 Combined Reaper and Mower.

April 26th, 1879, in Otoe County, Nebraska, upon one No. 1 Valley Chief Combined Reaper and Mower.

April 28th, 1879, in Cumming County, Nebraska, upon five Valley Chief Reaper and Mowers.

April 28th, 1879, in Dodge County, Nebraska, upon eight Valley Chief Combined Reapers and Mowers.

April 30th, 1879, in Platte County, Nebraska, upon seven Valley Chief Combined Reapers and Mowers.

May 1st, 1879, in Hall County, Nebraska, upon five No. 1 Combined Valley Chief Reapers and Mowers.

May 2d, 1879, in Fillmore County, Nebraska, upon two Valley Chief Combined Reapers and Mowers.

May 3rd, 1879, in Douglas County, Nebraska, upon two No. 1 Combined Valley Chief Reapers and Mowers.

I made said levy of this writ and attached said property in each of the aforesaid counties respectively, upon said days and dates in the presence of two residents of each of the said counties respectively, and upon the said days and dates. I summoned the said residents, and having administered to each of the said residents an oath to make a true inventory and appraisement of the personal property attached as aforesaid, and appraised the said property, which said appraise-
79 ments, signed by said residents as appraisers, are hereto attached and made a part of this return.

All of the aforesaid personal property was taken as the property of the within named defendants and to satisfy the within named plaintiff's claim.

WILLIAM DAILY,
U. S. Marshal.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this writ May 8, 1879, and thereupon I did levy the same upon and attach the following described personal property, as follows:

May 9th, 1879, in York County, Nebraska, upon one Combined Valley Chief Reaper and Mower.

May 12th, 1879, in Saline County, Nebraska, upon two Valley Chief Combined Reapers and Mowers.

I made said levy of this writ and attached said property in each of the aforesaid counties respectively, upon said days and dates, in the presence of two residents of each of the said counties respectively, and upon the said days and dates.

I summoned the said residents, and having administered to each of the said residents an oath to make a true inventory and appraisement of the personal property attached as aforesaid, and appraised the said property, which said appraisement, signed by said residents as appraisers, are hereto attached and made a part of this return.

All of the aforesaid personal property was taken as the property of the within-named defendants and to satisfy the within named plaintiff's claim.

WILLIAM DAILY,
U. S. Marshal,
By A. J. WRIGHT, *Deputy.*

80 Said 2nd alias attachment is endorsed as follows: No. 292, Doc. D. United States circuit court, district of Nebraska. John McPherson vs. James S. Marsh et al. 2nd alias attachment. Returned and filed May 13, 1879. Watson B. Smith, clerk, by Elmer D. Frank, deputy clerk. Webster and Gaylord, plaintiff's attorney'.

Thereupon, afterwards, to wit, on the 20th day of May, 1879, a motion to discharge attachments was filed in said case, which said motion is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

Now comes defendants and move the court to discharge, dissolve, and set aside the following orders of attachment herein and release the property therefrom, and tax up the costs thereof against the plaintiff, to wit:

The order of attachment dated March 25, 1879.

The order of attachment dated April 23rd, 1879, and the order of attachment dated the 16th day of May, 1879.

For reason of motion defendants say there is no undertaking for an attachment as required by law nor affidavit for attachment as required by law for any one of said orders of attachments.

And for the further reason that the only property attached in any or all of said attachments is the machines described in the pleadings herein, and the property of said plaintiff himself and the costs thereof should not be charged against defendants.

The defendants also reaffirm and insist on the motion to discharge the original attachment herein.

J. H. BROADY,
Att'y for Defendants.

81 Said motion is endorsed as follows: John McPherson vs. James S. Marsh and E. C. Marsh. No. 292, D. Motion to discharge attachments. Filed May 20, 1879. Watson B. Smith, clerk. J. H. Broady.

Thereupon, afterwards, to wit, on the 30th day of May, 1879, an amendment to defendants' answer was filed in said case, which said amendment is in words and figure' following, to wit:

Amendment to answer.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

The defendants, for amendment to the answer, make these additional allegations and averments, to wit: That at the time of the execution of the contract, copied in the original answer and as a part thereof, and also both before that time and after that time, it was agreed by and between the plaintiff and defendants that if it should be ascertained that any of said machines named in said contract, or any parts of any of said machines should be missing, or any of said machines should be deficient or be out of repair or in bad condition, or in any way encumbered or charged with any liens or in any way not in the condition stated in said contract; that the defendants should supply all such machines or parts of machines or deficiencies, and remove all such encumbrances or liens, or both, and make all such repairs when needed and put in good condition where needed before or during the spring of 1878, in time for the sale of machines for the harvest of 1878, and defendants allege that the month of May, 1878, was soon enough for the sales for the harvest of 1878, and was so agreed to be then and there by the parties; and that defendants should have until May, 1878, to do said
82 things. The defendants duly performed all the conditions of said agreement on their part to be performed, and within the time provided in said agreement, ascertained the condititon of all the said machines, and all omissions or deficiencies, and wherever any of said machines were missing or deficient or in bad condition or out of repair or otherwise not in the condition as aforesaid, supplied all such omissions or deficiencies and made all needed repairs and supplied all things needed and removed all liens or charges, and in all things made the said machines in good condition conformable to said contract.

That at the time of the making the contract copied in said original answer, and before and after that time, it was agreed by and between the plaintiff and defendants that the difference, if any, between twenty-five dollars and the actual freights on the Valley Chief machines, upon which plaintiff founds in second cause of action should be settled when the taxes on the same machines for 1878 could be ascertained, which was not sooner than July 1, 1878, and that if these was any liability of defendants on account of such freights, that defendants should have until the time last aforesaid to settle or pay the same.

Defendants further allege that on the three machines shipped to plaintiff by defendant from Lewisburg, and received by plaintiff, as alleged in the original answer, the defendants paid the freight, amounting to about sixty dollars, to the use and benefit of plaintiff, for which plaintiff is indebted to defendants in the sum of sixty dollars, which remains due and unpaid, and for which, in addition to and together with the sum claimed in the original answer (all of which original answer is hereby reaffirmed), defendants pray judgment against plaintiff.

L. W. COLBY & J. H. BROADY,
Attorneys for Defendants.

STATE OF NEBRASKA, UNITED STATES OF AMERICA,
District of Nebraska, ss:

James S. Marsh, being duly sworn, say': I am one of said defendants and that the facts stated in the foregoing pleading are true, as I believe.

JAMES S. MARSH.

Subscribed in my presence and sworn to before me this 29th day of May, 1879.

WATSON B. SMITH, *Clerk.*

83 Said amendment to answer is endorsed as follows: 272. D. I. John McPherson vs. James S. Marsh and E. C. Marsh. Amendment to answer. Filed May 30, 1879. Watson B. Smith, clerk. Colby & Broady, att'ys.

Thereupon, afterwards, to wit, on the 2nd day of June, 1879, a supplemental petition was filed in said case, which said supplemental petition is in words and figures following, to wit:

Supplemental petition.

In the circuit court of the United States, district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
against
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

Now comes the plaintiff and for additional allegations to his said petition herein, says that on the 7th day of November, 1877, he made a demand of the said defendants for the delivery of five of the said eight Marsh No. 4 machines to him at Lewisburg, Pennsylvania, according to the terms of said contract, but that the defendants wholly refused to deliver the same or any part thereof to him.

Wherefore he prays as he has prayed in his petition.

T. L. SCHICK AND J. L. WEBSTER,
Att'ys for Pl'ff.

STATE OF NEBRASKA,
Douglass County, ss:

John McPherson, being duly sworn on his oath, says that the allegations contained in the above supplemental petition are true.

JOHN MCPHERSON.

Subscribed in my presence and sworn to before me this 2nd day of June, 1879.

WATSON B. SMITH,
Clerk U. S. Court.
By E. D. FRANK, *Deputy.*

84 Said suppl'mental petition is endorsed as follows: No. 292 D. I. John McPherson vs. James S. Marsh et al. Supplemental petition. Filed June 2, 1879, Watson B. Smith, clerk. J. L. Webster and T. L. Schick, att'ys for plaintiff.

Thereupon afterwards, to wit, on the said 2nd day of June, 1879, a reply to amendment to answer was filed in said case, which said reply is in words and figures following, to wit:

Reply to amendment to answer.

In United States circuit court, district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

Now comes the plaintiff and for a reply to the amendment to answer filed herein, denies each and every allegation in said amendment contained.

Plaintiff further avers that said amendment does not state facts sufficient to constitute a defence to the claim of plaintiff as set forth in his petition.

WEBSTER & GAYLORD & T. L. SCHICK.
Att'ys for Plaintiff.

STATE OF NEBRASKA,
Douglass County:

John McPherson, being first duly sworn, deposes and says that he believes the facts stated in the foregoing reply to be true.

JOHN MCPHERSON.

Subscribed in my presence and sworn to before me this 2' day o June, 1879.

WATSON B. SMITH, *Clerk.*
By E. D. FRANK, *Deputy.*

85 Said reply is endorsed as follows: 292 D. U. S. circuit court dist. of Nebraska. Jno. McPherson vs. Marsh et al. Reply to amendment to answer. Filed June 2, 1879. Watson B. Smith, clerk, by E. D. Frank, deputy. Webster & Gaylord, T. L. Schick.

Thereupon said cause came on for trial on the 28th day of May, 1879, before the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, and a jury, and said trial was continued from day to day until the 2nd day of June, 1879, when the following proceedings were had as appears of record on *folio* 501, journal E, of said court.

Verdict.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL. 292 D.

This day again came the said parties, by their attorneys; also came the jury heretofore empanneled and sworn herein, and one of said jurors, to wit, Benjamin H. Bailey asking to be excused from further service herein, the parties herein consent and agree in open court that said juror may be excused, and that the remaining eleven jurors may find a verdict herein. Thereupon said juror was *w* excused by the

court, and the case proceeded, and the said eleven jurors having heard the remaining testimony, the arguments and charge of the court, retire to their room, in charge of a bailiff duly sworn, for deliberation.

And now the said eleven jurors come into open court and present to the court their verdict in writing, which is in words and figures following, to wit:

In the circuit court of the United States, district of Nebraska.

86 JOHN MCPHERSON
against
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

We, the jury sworn and empanneled in the above-entitled cause, do find for the plaintiff and assess his damages at the sum of six thousand eight hundred and forty-eight dollars and twenty-five cents, ($6,848.25).

F. W. ROBB, *Foreman.*

Thereupon afterwards, on the 4th day of June, 1879, a motion for a new trial was filed in said cause by said defendants; which motion is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

Now come defendants and move the court to vacate and set aside the verdict of the jury herein, and grant a new trial herein, for the following causes, to wit:

1st. Excessive damages, appearing to have been given under the influence of passion and prejudice.

2nd. Error in the assessment by the jury of the amount of recovery by making the amount too large.

3rd. That the said verdict herein is not sustained by sufficient evidence and is contrary to law.

4th. That there is no testimony to support the verdict.

87 5th. That the jury disregarded and disobeyed the instructions of the court.

6th. The jury, in their said verdict, gave damages without any testimony on which to base it.

7th. The defendants also pray that the verdict be vacated and set aside and a new trial granted because of errors of law occurring at the trial, and excepted to by the parties making this motion at the time, that is, by these defendants.

The following rulings in the delivery of the testimony of the following-named witnesses were made and at the time excepted to by the defendants, in each and all of which there is error of law affecting materially and substantially the rights of defendants, to wit:

In the circuit court of the United States, district of Nebraska.

JOHN MCPHERSON *vs.* JAMES S. MARSH ET AL. } 292 D. Trial at Omaha, commencing May 28, 1879.

Extracts from record showing exceptions taken by defendants.

M. H. BROWN, a witness called for plaintiff, being duly sworn and examined in chief, testified as follows, viz:

* * * * * * *

Q. Let me ask you if you know what was the amount of freight on these machines to your place.

A. $36.08 for two.

Q. Were they charged up to you?

A. That was the charge to us at Fairmont.

(Objected to. There is no cause of action raised upon the freight. The objection is overruled. Defendants except.)

88 * * * * * * *

Cross-examined:

Q. Was not Mr. Church around in February or March?

(Objected to as immaterial.)

The COURT. It seems to me that what was done about this matter after the suit commenced can have no relevancy.

(The objection is sustained. The defendants except.)

* * * * * * *

Q. Has not that extra sickle been furnished?

(Objected to as immaterial. The objection is sustained. Defendants except.)

W. F. SLOAN, a witness for plaintiff, examined in chief.

* * * * * * *

Q. State now what claim you had on that machine until that freight was paid you, if any.

(Objected to as incompetent. The objection is overruled. Defendants except.)

J. N. MCCONNELL, a witness for plaintiff, cross-examined.

* * * * * * *

Q. Don't you know that that there never was a contract drawn?

A. I never heard of their signing any.

Q. Don't you know that there is a lawsuit about it?

(Objected to. The objection is sustained. The defendants excepts.)

JOHN STABLER, a witness for plaintiff, examined in chief.

* * * * * * *

Q. State whether or no you declined to turn them over to him.

(Objected to as immaterial. The objection is overruled. Defendants except.)

Q. State up to that time what authority you had from the Marshes to turn the machines over to McPherson.

(Objected to as immaterial and incompetent. The objection is overruled. Defendants except.)

Q. State what was the amount of the freight on each of the machines from Lincoln up to your place at Hastings.

89 (Objected to as irrelevant to the issue and incompetent, because it asks for the average, and immaterial. The objection is overruled. Defendants except.)

* * * * * * *

Q. What was that storage worth up to the 5th of November.

A. Five dollars a month.

Q. How many months did you keep them stored under that arrangement?

A. Nine months to the 5th of November.

Q. That had been paid you?

A. No, sir.

Q. Was that one of the reasons why you declined to turn them over to McPherson?

(Objected to.)

Q. Why did you decline to deliver the goods to McPherson?

(Objected to as immaterial, incompetent, and irrelevant. The objection is overruled. Defendants except.)

Cross-examined:

Q. Was not that extra sickle furnished by the Marshes in February or March, 1878?

(Objected to as immaterial and irrelevant. The objection is sustained. The defendants except.)

J. F. WOODS, a witness for plaintiff, cross-examined.

* * * * * * *

Q. Was it not put in good condition by the Marshes?

(Objected to as immaterial and irrelevant. The objection is sustained. Defendants except.)

Q. You say there was some parts defective in the machine?

A. Yes, sir.

Q. Were not those parts supplied?

90 (Objected to as immaterial and irrelevant. The objection is sustained. Defendants except.)

J. D. SEAMAN, a witness for plaintiff, examined in chief.

* * * * * * *

Q. State what you said to McPherson as to the number of knives the machine had.

(Objected to as immaterial, incompetent, and irrelevent. The objection is overruled. The defendant' except.)

Q. State what you said to him about the shortage on these same machines; as to other shortage aside from the sickles.

(Objected to as immaterial and incompetent. The objection is overruled. Defendants except.)

H. M. DORSEY, a witness for plaintiff, examination-in-chief.

* * * * * * *

Q. State now the condition of these nine Valley Chief machines.

(Objected to as immaterial, incompetent, and irrelevant. The objection is overruled. The defendants except.)

J. J. CARPENTER, a witness for plaintiff, examined-in-chief.

* * * * * * *

Q. In the condition in which they were in at that time, were these machines saleable upon the market?

(Objected to as immaterial and irrelevant. The objection is sustained. Defendants except.)

Cross-examined:

Q. Do you remember whether these machines were put in good condition by the Marsh's?

A. They have done so.

Mr. WEBSTER. When?

A. In March and April, 1878.

(Counsel for plaintiff moves that the above testimony relating to repairs in March and April, 1878, since commencement of this suit, be stricken out. The motion is sustained. Defendants except.)

91 WILLIAM HOOVER, a witness for plaintiff, examined-in-chief.

* * * * * * *

Q. Whether or no you declined to turn over these machines until the freights were paid upon them?

(Objected to as immaterial and irrelevant. The objection is overruled. Defendants except.)

W. J. KENNEDY, a witness for plaintiff, cross-examined.

* * * * * * *

Q. This one that needed repairs—were those repairs made by the Marsh's? Has that rake-table, that you say was needed, been furnished?

(Objected to as immaterial and irrelevant. The objection is sustained. Defendants except.)

JOHN MCPHERSON, a witness for plaintiff, examined in chief.

Plaintiff offers in evidence letter of W. J. Kennedy, dated January 7th, 1877, to McPherson.

(It is objected to as immaterial and irrelevant. The objection is overruled. Defendants except.)

* * * * * * *

Q. State what you did at Crete.

A. I stopped there twice, but was not able to find the machines, or parties that sold them.

Q. State the extent of your enquiries.

(Objected to as immaterial and irrelevant. The objection is overruled. Defendants except.)

* * * * * * * *

Q. State what enquiries you made as to the names of the parties at these places I have named as having charge of these machines of the Marsh's.

(Objected to as irrelevant to the issue. The objection is overruled. Defendants except.)

* * * * * * * *

Q. State what there was about the eight machines which were to come from the shops.

(Objected to. Nothing is alleged about that is the petition. Objection overruled. Defendants except.)

* * * * * * * *

92 Q. What was said about the other five to be shipped afterwards?

(Objected to as leading; the objection is overruled; defendants except.)

Plaintiff rests.

DOLAN called for defendant; examined-in-chief.

Q. State what, if anything, you know about any conversation or agreement between the Marsh's and McPherson as to fitting up and repairing those Valley Chief reapers that were scattered around the country?

(Objected to as incompetent and as not claimed in the answer; the objection is sustained; defendants except.)

* * * * * * *

Q. State what, if anything, you know of any agreement between the parties to this suit in relation to the settlement of the claim for the difference of freights as charged in the second clause in the petition; the second cause of action in the petition?

(Objected to as immaterial and incompetent; the objection is sustained; defendants except.)

Q. State what, if anything, you know of such an agreement as either the one I asked about in the last question, or last question but one, between the parties to this action after making the contract of November 5, 1877, in litigation in this suit.

(Objected to as immaterial and incompetent; the objection is sustained; the defendants except.)

* * * * * * *

Q. How much were the cigars put in at in that trade?

(Objected to on ground that there is no warranty of those cigars; the objection is sustained; the defendants except.)

Q. State, if you know, the quality of those cigars.

93 (Objected to for reason stated in last objection; the objection is sustained; defendants except.)

Cross-examined:

Q. These three machines that were ordered were three of the eight, were they?

A. I believe they were.

(Counsel for defendant moves to strike out what the witness says he believes; the motion is denied; to which ruling of the court defendants except.)

CHENY, a witness recalled by plaintiff, examined in chief.

Q. Let me ask you to state as near as you can what would be the difference in value in the machines at Wahoo in the condition in which they were then without repairs, and what would have been their value if they had been in good order, in good condition.

Mr. BROADY. At what time?

Mr. WEBSTER. Along in the last of the fall of 1871 or first of 1878.

Mr. BROADY. I would like to have it confined to November, 1877.

(Defendants object as immaterial and irrelevant; the objection is overruled; defendants except.)

STABLER, a witness recalled for plaintiff, examined in chief.

* * * * * * *

Q. State what was the difference, if any, between the value of the other machines arising from age or anything else, and what it would have been if they had been in good condition.

(Objected to as assuming that the witness has stated that they were in bad condition; the objection is overruled; defendants except.)

J. C. CLARK, a witness recalled for plaintiff, examined in chief.

94 Q. State the difference in value between a machine which has been out on trial and in use one season or two and what would be its value in good condition without such use.

(Objected to; the question should be confined to this particular machine; it depends on how it is used. The objection is overruled; defendants except.)

JAMES S. MARSH, a witness called for defendant, examined in chief.

* * * * * * *

Q. State whether you agreed at that time in reference as to how you should stand good to McPherson in case of deficiencies if machines should be found out of repair.

(Objected to as immaterial and incompetent; the objection is sustained; defendants except.)

C. C. CLARK, a witness called for defendant, examined in chief.

Q. In 1877, state about the cash value of the Valley Chief reapers No'. 1 & 2 in Nebraska at places such as are named in this contract.

(Objected to as immaterial; the objection is sustained; defendants except.)

Counsel for defendants except to each and every portion of the charge, also to the refusal of the court to instruct the jury as requested by counsel for defendants.

Also there is error of law in the refusal of the following instructions to the jury asked by defendant and refused by the court and exception duly taken, to wit:

"The jury are instructed that if they find there is any breach of the warranty in the contract dated November 5, 1877, warranting that the machines are at the places named, and in the condition therein mentioned, that the defendants had the right to make good such warranty in a reasonable time by replacing missing machines and repairing and putting in good condition those not in such condition named."

95 There was error of the court prejudicial to defendants also in refusing the following instructions asked by defendants to which refusal exception was duly taken, to wit:

"The jury are instructed that if they find there was any breach of the warranty named in the contract of November 5, 1877, that the measure of damages for such breach is the difference in value of such machines as they actually were and as they were warranted to be, less the benefit to the property by what the defendants have done to make good such warranty."

The court also erred in giving each of the following instructions asked by the plaintiff, to the giving of each the defendants duly excepted, to wit:

"The jury are instructed that they are not permitted to take into account or make any allowance or deductions from the damages of the plaintiff for repairs of any kind made upon the machines on supplies furnished for them after November 5, 1877, all such acts on their part being without authority, and the plaintiff is entitled to recover the full measure of his damages as if no such repairs had ever been made.

"The jury is instructed that the plaintiff is entitled to recover for any machines which were not at the places named at the time of the making of the contract of November 5, 1877, the price of said machines as fixed in the contract, and if you find that the defendants failed to

deliver any of the machines to be delivered at Lewisburg, Penn., after demand made by plaintiff, the plaintiff is entitled to recover the contract price of such machine.

"On such machines as were delivered to the plaintiff he is entitled to recover for any defects in quality or condition, and the measure
96 of his damages is the difference between the value of such machines in the condition in which they were and the contract price.

"The plaintiff is entitled to recover as a part of his damages the differetce between twenty-five dollars, the estimated freight on each machine from Lewisburg, Penn., and the actual freight paid."

Further, the court and jury both erred in the trial of this cause because the pleadings show affirmatively no cause of action in favor of plaintiff.

L. W. COLBY AND J. H. BROADY,
Attorneys for Defendants.

Upon the back of said motion for a new trial appear endorsements as follows, to wit: No. 292 D. Joh. McPherson vs. James S. Marsh and E. C. Marsh. Motion for new trial. Filed June 4, 1879. Watson B. Smith, clerk. J. H. Broady, L. W. Colby, att'ys.

Thereupon afterwards, to wit, on the 4th day of June, 1879, a 3rd alias attachment was returned and filed in said case; which said alias attachment is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH.

DISTRICT OF NEBRASKA, *ss:*

The President of the United States of America to the marshal of the district of Nebraska, greeting:

You are hereby commanded, as you have heret'fore been commanded, to attach and safely keep the lands, tenements, goods, chattels, stocks, or interests in stocks, rights, credits, moneys, and effects of the above-named defendant in your district, not exempt by law, from being applied to the payment of the above-named plaintiff's claim, or so much thereof as will satisfy the said plaintiff's claim for ($23,237.00) twenty-
97 three thousand two hundred thirty-seven dollars, and fifty dollars, the probable costs of this action.

You will make due return of this order on the 5th day of June, A. D. 1879.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of May, A. D. 1879, and the 103rd year of the Independence of the United States of America.

[SEAL.] WATSON B. SMITH, *Clerk.*

Attached to said 3rd alias attachment are appraisements and returns of the marshal in words and figures following, to wit:

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON }
vs.
J. S. MARSH ET AL. }

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by A. G. Hastings, deputy, and J. R. Kidd and S. W. Christy, two residents of Clay County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff and J. S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property, to wit: One reaper and mower combined machine called the Valley Chief, said machine appraised at the sum of fifty dollars ($50.00).

Given under our hands this 23rd day of May, 1879.

WM. DAILY,
Marshal of the United States for the District of Nebraska,
98 By A. G. HASTINGS, *Deputy.*
J. R. KIDD.
S. W. CHRISTY.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON }
vs.
JAMES S. MARSH ET AL. }

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by A. G. Hasting, deputy, and J. F. McNee and E. O. Wallace, residents of Thayer County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled-cause, and wherein John McPherson is plaintiff and James S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property, to wit: Five combined reaper and mowing-machines called the Valley Chief, at ninety dollars ($90.00) each; total, four hundred and fifty dollars.

Given under our hands this 23rd day of May, 1879.

WM. DAILY,
Marshal of the United States for the District of Nebraska,
By A. G. HASTINGS, *Deputy.*
J. F. MCNEE.
E. O. WALLACE.

In the circuit court of the United States for the district of Nebraska.

99 *Appraisement.*

JOHN MCPHERSON
vs.
J. S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by A. J. Wright, deputy, and P. M. Humphry and F. M. Pratt, two residents of Johnson County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and appraisement of the following property levied upon and taken by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and J. S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property, to wit: One combined Valley Chief reaper and mower at $75.00 (seventy-five dollars.)

Given under our hands this 20th day of May, 1879.

WILLIAM DAILY,
Marshal of the United States for the District of Nebraska,
By A. J. WRIGHT, *Deputy.*
P. M. HUMPHRY.
F. M. PRATT.

Appraisement.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL.

The undersigned, William Daily, marshal of the United States for the district of Nebraska, by A. G. Hastings deputy, and H. C. Hastings and Edward McIntyre, two disinterested residents of Seward County, State and district of Nebraska, the said residents being duly sworn by said marshal to make a true inventory and impartial appraise-
100 ment of the following property attached by virtue of an attachment issued out of the circuit court of the United States in the above-entitled cause, and wherein John McPherson is plaintiff, and James S. Marsh et al. are defendants, do, upon our oaths, inventory and appraise said property at, to wit:

Two reaper and mowing machines combined, called the Valley Chief, at the sum of eighty dollars each—total, one hundred and sixty dollars.

Given under our hands this 26th day of May, 1879.

WM. DAILY,
Marshal of the United States for the District of Nebraska,
By A. G. HASTINGS, *Deputy.*
H. C. HASTINGS.
EDMUND MCINTYRE.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this writ May 16th, 1879, and thereupon I did levy the same upon and attach the following-described personal property, as follows:

May 23rd, 1879, in Clay County, Nebraska, upon one Valley Chief Combined Reaper and Mower.

May 23rd, 1879, in Thayer County, Nebraska, upon five Valley Chief Combined Reapers and Mowers.

May 26th, 1879, in Seward County, Nebraska, upon two Valley Chief Combined Reapers and Mowers.

I made said levy of this writ and attached said property in each of the aforesaid counties, respectively, upon said days and dates, in the presence of two residents of each of the said counties respectively, and upon the said days and dates I summoned the said residents, and having administered to each of the said residents an oath to make
101 a true inventory and appraisement of the personal property attached as aforesaid, and appraised the said property, which said appraisements, signed by said residents as appraisers, are hereto attached and made a part of this return.

All of the aforesaid personal property was taken as the property of the within-named defendants, and to satisfy the within-named plaintiff's claim.

WILLIAM DAILY,
U. S. Marshal,
By A. G. HASTINGS, *Deputy.*

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I received this writ May 16th, 1879, and thereupon I did levy the same upon and attach the following-described personal property, as follows:

On May 20th, 1879, in Johnson County, Nebraska, upon one Valley Chief Combined Reaper and Mower.

I made said levy of this writ and at'ached said property in the said county in the presence of two residents of said county, and upon said day and date I summoned said residents, and having administered to each an oath to make a true inventory and appraisement of the personal property attached as aforesaid and appraised the said property, which said appraisement, signed by said residents as appraisers, is hereto attached and made a part of this return.

The aforesaid personal property was taken as the property of the within-named defendants, and to satisfy the within-named plaintiff's claim.

WILLIAM DAILY,
U. S. Marshal,
By A. J. WRIGHT, *Deputy.*

Said 3rd alias attachment is endorsed as follows: No. 292. Doc. D. United States circuit court, district of Nebraska. John McPherson vs. James S. Marsh et al. Returned and filed June 4th, 1879. Watson B. Smith, clerk. Webster and Gaylord, plaintiff's attorneys.

102 Thereupon, afterwards, at the May adjourned term of said court, on the 26th day of June, 1879, the following proceedings were had, as appears of record on folio 591, journal E, of said court:

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH. } 292, D.

The motion of the defendants herein to dissolve the attachment heretofore issued herein having been argued by counsel and submitted to

the court, and the court being fully advised in the premises, it is ordered and adjudged that said motion be, and the same is hereby, overruled, and that said attachment is sustained, and to which ruling the defendants except.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH. } 292, D.

The motion for a new trial herein having been argued by counsel and submitted to the court, and the court being fully advised in the premises, it is ordered and adjudged by the court that said motion for a new trial be, and the same is hereby, overruled.

And thereupon said plaintiff, by his attorneys, moves the court for judgment on the verdict herein, which on a former day of this term was rendered in favor of said plaintiff in the sum of six thousand eight hundred and forty-eight dollars and twenty-five cents (6,848.25). It is therefore ordered and adjudged by the court that the said plaintiff, John McPherson, recover from the said defendants, James S. Marsh and E. C. Marsh, the said sum of six thousand eight hundred and forty-eight dollars and twenty-five cents ($6,848.25), together with his costs herein expended.

Thereupon said defendants, by their attorneys, except to the entry of judgment herein.

103 JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL. } 292, D.

Now come the partie' herein, by their attorneys, and in open court consent and agree that William Daily, U. S. marshal for this district, may proceed to sell at private or public sale, and at such times and on such terms as he may deem for the best interests of the parties herein, the Valley Chief reaping and mowing machines levied upon by him, by virtue of an order of attachment issued herein, which said machines are now in said marshal's custody at West Point and Fremont, Nebraska. The proceeds of said sales to be deposited in the registry of the court to abide the further order of the court.

JOHN MCPHERSON
vs.
JAMES S. MARSH ET AL. } 292, D.

On motion of said defendants, by their attorneys, forty days from this day are allowed them in which to file a bill of exceptions in this case.

Thereupon, afterwards, to wit, on the 7th day of Aug., 1879, a stipulation was filed in said case; which said stipulation is in words and figures following to wit:

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDants.

We, the said parties, do hereby agree that the time allowed by the court to defendants to prepare bill of exceptions be extended thirty

days longer than the time allowed by the court, that is to say,
104 seventy days from the date of the judgment herein, and a bill prepared within that time shall be as effectual for all purposes as if prepared within the forty days named in the order of the court, and shall be entered as within the said forty days, saving to plaintiff any right of objection, however, to power of court to make said order, allowing forty days for said purpose.

J. H. BROADY & L. W. COLBY,
Att'ys for Defendants.

JULY 28, 1879.

JNO. L. WEBSTER,
Att'y for Plaintiff.

Said stipularion is endorsed as follows: McPherson vs. Marsh. 292, D. Stipulation to extend time to prepare bill of exceptions. Filed Aug. 7, 1879. Watson B. Smith, clerk.

105 Thereupon, afterwards, to wit, on the 13th day of August, 1879, a bill of exceptions was filed in said case; which said bill of exceptions are in words and figures following:

Bill of exception.

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON, PLAINTIFF,
vs.
JAMES S. MARSH AND E. C. MARSH, DEFENDANTS.

Be remembered that on the trial of this cause in the circuit court of the United States for the district of Nebraska, at the May, 1879, term, the following testimony and evidence was offered and introduced by the plaintiff and defendants herein to maintain the issues on their parts herein, and the following rulings, objections, exceptions, and proceedings were had and done:

106 M. H. BROWN, being introduced and sworn by plaintiff, having sworn, among other things, that he had two of the machines involved in this litigation at Fairmount, was asked by plaintiff the questions which were objected to and exceptions, as follows:

Q. Let me ask, if you know, what was the amount of the freight on these machines to your place?

A. Thirty-six dollars and eighty cents for the two.

Q. That was charged up to you?

A. That was charged to us at Fairmont.

(Objected to as immaterial; there is no cause of action raised upon the freight.)

The COURT. I think where the petition alleges that you agreed to make the difference good if it cost less than $25.00 on each machine, even though there might be a stipulation which required them to settle, this would be the proper way to settle it.

(The objection is overruled, and defendants except.)

The witness among other things having testified that the machines at Fairmont were out of repair and deficient in extras, the defendants

for the purpose of proving that the defendants have since the commencement of this action put them in good repair and furnished all extras missing, asked this question:

Q. Was not Mr. Church around in February or March?

(Objected to as immaterial.)

The COURT. It seems to me that what was done about this matter after the suit commenced can have no relevancy.

(The objection is sustained; defendants except.)

107 Q. Has not that machine been put in good condition, and have not these freights been paid by the Marshes in February or March, 1878?

(Objected to as immaterial; the objection is sustained.)

Q. Has not that extra sickle been furnished?

(Objected to as immaterial; the objection is sustained; defendants except.)

W. T. SLOAN, a witness introduced and sworn by plaintiff to maintain the issues on his part, after having testified that he had one at Nebraska City in his charge, and that there was $15.90 freight due on that machine, was asked the following question, to which defendants objected and excepted, as follows:

Q. State now what claim you had on that machine until the freight was paid you, if any.

(Objected to as incompetent; if he has contract allowing freight he should show it; the objection is overruled; defendants except.)

A. I had a claim for that amount of freight.

JOHN STABLER, a witness introduced and sworn by plaintiff to maintain the issues on his part, having, among other things, sworn that he had seventeen machines at Hastings, Nebraska, in charge, and that J. C. Clark, the gen'l agent of defendants for Nebraska, had instructed him to store the machines, and that the storage was worth $45.00; and that plaintiff called for them at Hastings in latter part of December, 1877, or fore part of January, 1878, testified as follows, in answer to the following questions, to which defendants objected and excepted, as follows:

108 Q. State whether or no you declined to turn them over to him.

(Objected to as inamaterial; the objection is overruled; defendants except.)

A. I did decline.

Q. State, up to that time, what authority you had from the Marshes to turn the machines over to McPherson.

(Objected to as incompetent and immaterial; the objection is overruled; defendants except.)

A. I had no instructions from the Marshes to turn them over.

Q. State what was the amount of freight on each of the machines from Lewisburg, Pa., to your place at Hastings.

(Objected to as immaterial; the objection is overruled; defendants except.)

A. Twelve dollars and a half would be the average.

And the said witness, John Stabler, having testified in chief that one of the machines in his charge at Hastings was out of repair and missing one sickle, the defendants, on cross-examination, asked this question:

Q. Has not that machine been repaired where you say it needed

paint? Was not that extra sickle furnished by the Marsh's in February or March, 1878?

(To which question plaintiff objected on the ground of immateriality, which objection the court sustained, to which ruling of the court the defendants at the time excepted.)

JOHN F. WOOD, a witness introduced and sworn by plaintiff, having, among other things, sworn that he had one of the machines in
109 question in this case in his charge at Schuyler, and that it was out of repair and missing in some parts, was on cross-examination asked by the defendants this question, which was before the amendment to answer was filed:

Q. Was it not put in good condition by the Marsh's?

(To which question plaintiff objected as immaterial, which objection the court sustained, to which ruling of the court the defendants at the time excepted.)

And also this question:

Q. Were not these parts supplied?

(To which question the plaintiff objected as immaterial, which objection the court sustained, to which ruling of the court the defendants at the time excepted.)

H. M. DORSEY, a witness introduced and sworn by plaintiff to maintain the issues on his part, was by plaintiff questioned, among other things, as follows, to which questions the following answers were given and objections made and exceptions taken by defendants:

Q. Do you know about some Valley Chief machines which were at Fairmont in the fall of 1877?

A. In the first of January, 1878, I found the machines there.

Q. How many?

A. Nine were there.

Q. State now the condition of these nine Valley Chief machines.

(Objected to as immaterial; the objection is overruled; defendants except.)

A. The machines were in very bad order. They were in my way. I had to pry some out of the mud; the boxes were broken up
110 and pieces thrown about every way. They were on a vacant lot I bought.

The witness afterwards swore he had seen the machines on the vacant lot where he found them in January, 1878, for a year before with no covering over them.

J. J. CARPENTER, a witness introduced and sworn by plaintiff to maintain the issues on his part, having in chief sworn that the nine machines at Fremont were out of repair, was, on cross-examination, asked by defendants this question:

Q. Do you remember whether these machines were put in good condition by the Marsh's?

To which the witness answered:

A. They have been.

Thereupon the plaintiff asked the witness this question:

Q. Was it after the 15th of January when this was done; when?

To which the witness answered as follows:

A. In March and April, 1878.

(Thereupon the plaintiff's counsel moved to strike out and take from the jury all the testimony of this witness relating to repairs since the

commencement of this action, which motion the court sustained and excluded from the jury the said testimony, to which ruling the defendants excepted.)

W. J. KENNEDY, a witness introduced and sworn by plaintiff, having in chief given testimony tending to prove that two of the machines in controversy were in his possession at Omaha and were out of repair, the defendants in cross-examination asked him this question:

Q. Those that were needing repairs were those repairs made by the Marsh's? Has that rake-platform that you say was needed been furnished?

111 (To which question the plaintiff objected as immaterial and irrelevant, which objection the court sustained, to which ruling of the court the defendants excepted.)

H. H. DOLAN, a witness introduced and sworn by defendants to maintain the issues on their part, having given testimony tending to show that he was present part of the time during the transaction between the plaintiff and defendants involved in this action, and was clerking for plaintiff in dry-goods trade, was asked by defendants this question:

Q. State what, if anything, you know of any conversation or agreement between the Marsh's and McPherson as to deficiencies or repairing for the reapers which were scattered around the country.

(To which question the plaintiff objected as incompetent and irrelevant, and as not claimed in the answer, which objection the court sustained and excluded the answer, to which ruling the defendants at the time excepted.)

Thereupon the defendants asked of the said witness Dolan these questions, which were objected to by plaintiffs, and objections sustained by the court and answers excluded, to which rulings the defendants at the time excepted as follows:

Q. State what, if anything, you know of any agreement between the parties to this suit in relation to the settlement of a claim for freights, if any, as charged in the second cause of action in this petition.

(Objected to as immaterial and incompetent by plaintiff; sustained, and defendants except.)

Q. State what you know, if anything, about such an agreement as either the one I asked about in the last question or the last

112 question before that, between the parties to this action after the making of the contract of Nov. 5th, 1877, in litigation in the suit.

(Objected to by plaintiff the same as last above sustained, and defendants except.)

Q. State if you know of any such verbal agreement or agreements as asked for between the parties to this suit made prior to the execution of the contract of Nov. 5, 1877, or at that time.

(Objected to by plaintiff as incompetent; sustained, and defendants except.)

Q. How much were the cigars put in at in that trade?

(Objected to on the ground that there is no warranty of those cigars; it is immaterial; the objection is sustained; defendants except.)

Q. State if you know the quality of those cigars.

(Objected to as immaterial; the objection is sustained; defendants except.)

Q. State if you know there were several brands of cigars?
(Objected to as immaterial; the objection is sustained; defendants except.)

JAMES S. MARSH, a witness introduced and sworn by defendants to maintain the issues on their part, having, among other things, sworn that he was one of defendants and contracting parties in the contracts copied in the pleadings, and that the same were agreed upon No-
113 vember 5th, 1877, was asked these questions by defendants' counsel, to each of which plaintiff objected, as hereinafter stated, which several objections the court sustained and excluded answers, and to each of the said several rulings of the court the defendants at the time duly excepted:

Q. State the circumstances of the contracting parties at the time.
(Objected to by plaintiff as immaterial; sustained, and defendants except.)

Q. State whether you and Mr. McPherson agreed upon any settlement of the difficulties between you involved in this action.
(Objected to by plaintiff as immaterial; objection sustained, and defendants except.)

Q. State whether you agreed at that time in reference as to how you should stand good to McPherson in case that deficiencies in the machines should be found, or machines out of repair.
(Objected to by plaintiff as incompetent and immaterial; sustained, and defendants except.)

Q. State whether at that time McPherson made any representations as to the cigars in the store.
(Objected to by pl'ff as incompetent; sustained, and defendants except.)

There having been evidence admitted in the case tending to prove that many of the machines involved in this action were out of repair or missing in parts or otherwise, not in as good condition as named in the contract, and that J. C. Clark has been the general agent of defendants for Nebraska, who had control of the said machines from the time they were put at the places named in the contract till the
114 time of the making of the written agreements copied in the pleadings, and was acquainted with the values of the said machines at that time, the defendants, to maintain the issues on their parts, introduced the said J. C. CLARK and had him sworn as their witness, and asked him this question for the purpose of showing that the values of the said machines were less than the contract price named in the contracts copied in the pleadings:

Q. "State the cash value of the Valley Chief reapers Nos. one and two about November, 1877, in Nebraska at such places as are named in this contract between the parties to this suit."
(To which question the plaintiff objected as incompetent and immaterial, which objection the court sustained and excluded the answer, to which ruling the defendants at the time duly excepted.)

JOHN F. WOODS, a witness introduced and sworn by plaintiff to maintain the issues on his part, having, among other things, sworn that he had one of the machines involved in this action in his possession at Schuyler, Nebraska, and that the same was out of repair, was asked by plaintiff, in the examination-in-chief, this question:

Q. "In the condition it was then in what would that machine be worth to sell it on the market?"

(To which question the defendants objected as immaterial and incompetent, and because the rule of damages would be what it would take to make it what the contract called for, which objection the court overruled and admitted the answer, to which ruling of the court the defendants at the time duly excepted.)

The witness answered the said question as follows:

A. "I could hardly tell. I would not want to give very much for it."

During the trial evidence having been admitted tending to prove
115 that many of the machines named in the contracts copied in the pleadings were not in as good condition as called for in the said contracts, and were not supplied with all the pieces specified in the contracts, and that in some instances the whole machine was missing, and what the values of such deficient or impaired machines in the condition in which they then were, and the difference in their values in such condition and the condition called for by the contract, and also on the part of defendants that defendants had made repairs on some machines and supplied deficiencies and missing machines since the commencement of this action, and the value thereof, but over the objection of plaintiff, instructions to the jury were given at request of the respective parties and on the court's own motion, and requests of defendants for instructions were refused, as follows:

The following oral instructions were given to the jury by the court:

The COURT. GENTLEMEN OF THE JURY: It may be that all the questions growing out of the controversy are already covered by the written instructions.

I think I can make two or three propositions a little plainer. As I have already said on one or two occasions in your hearing, this suit is brought to enforce a contract. The first contract is out of the question, for the reason that the parties made a second contract in which they agreed that the other contract was executed—the contract of Nov. 5th. Admit that fact and it must be of binding force.

The parties having admitted that the first contract is fully executed,
of course we must hold them to it. The defendants admit that
116 they have received full pay, and the plaintiff admits that *that* all the machines had been delivered to him. There is another contract, however, and that is the one on which this suit is based. The other provision is this: that the defendants guarantee that the machines named in the contract are at the places named in the contract of the 5th of November, 1877, and also that these machines are in good condition. Now, if there is a breach of this contract, the plaintiff is entitled to recover.

Now, it is entirely clear to me that on the 5th of November, 1877, when this contract was made between the parties and a memorandum of it was delivered, that vested the title to the machines in the plaintiff. In other words, on the 5th of November, 1877, the plaintiff became the absolute owner of every one of the machines found at the places named in the contract; but if the machines were not there then, of course the title did not vest in him, for the reason that they were not there. The extent of the damages in this case will be the difference that it would cost to put the machines in good condition, so as to comply with the contract, and also the value of those that were not there at the time and place stated in the contract.

If the testimony satisfies you that a portion of the machines were

not at the places stated in the contract on the 5th of November, 1877, then the plaintiff would be entitled to recover the value of any one machine not there; but if they were there, then the plaintiff would not be entitled to recover the value of any one machine unless it was absolutely worthless.

ould determine if machines were missing, and at what points, he first contract gives the names of the machines and states re they are; the second modifies it to some extent.

ien, agree that whatever the fact may be, where there are ... at Wahoo and one at another place, or two at another place and one at Wahoo, makes no difference; the parties assented to it.

It appears to me you ought to be exceedingly careful for fear that injustice may be done. If it is true that the title vests in the plaintiff and if the machines were found there at the places named, then he is entitled to them; if they have been placed there since, he is not bound by that fact. If he is entitled to them at all, of course he is entitled to get them. I have no doubt of the correctness of this proposition, that if any of those machines can be found they are his property, and he is entitled to the possession unless he has done something to divest himself of it since that time. If he has done anything himself, either by his own acts or by his carelessness or neglect, that is his fault. The title to the property passed on the making of the contract of the 5th of November, and he is entitled to the possession wherever found.

If you should find from the testimony that the machines were there on the 5th of November, or were there a short time afterward, that would be strong circumstantial evidence that they were there at the time. He is entitled to the immediate possession without reference to who has custody at the time.

This contract requires the defendants to deliver on board the cars at Lewisburg the eight machines, and there is a further provision in the contract which requires the plaintiff to make demand. The defendants were entitled to thirty days' notice before they were bound to deliver them, and they do not incur any liability for the alleged breach of the contract unless it is shown that the plaintiff made the demand for the machines, and the defendants had failed to comply for over thirty days after such demand.

118 It is clear enough that the plaintiff made demand for three and defendants at once complied by delivering the machines on board the cars at Lewisburg, and the plaintiff himself has testified that they were put on a car of corn-shellers, and if they did that and the machines were in good condition, that is a literal compliance with the contract without reference to the amount of freight said to have been charged thereon. Whether or not the agent of the railroad company refused to deliver unless he received the whole freight or a car-load we have nothing to do with—the agent was not justified in doing so. There was no reason and no good sense in the agent doing that. We could not apply a principal like that or entertain the idea for a moment. The contract binds the defendants to deliver on board the cars at Lewisburg, evidently, and when so delivered they made a full and complete compliance. I am bound to hold that a good delivery irrespective of the question of freight; the machines were his; it was the duty of the plaintiff to pay freight if he desired to retain them.

As to the other five machines, clearly it would be the duty of the plaintiff to made a demand. Did he make such a demand prior to the commencement of this suit? They would have thirty days to comply after notice that he was ready to receive. If the testimony satisfies

you that such a demand was not made, then there can be no recovery for those five machines. So for as the three are concerned they are out of the question.

Now, to the second count in the petition, the plaintiff had paid twenty-five dollars on each machine. The agreement between the parties here is that if the freight on those machines did not amount to twenty-five dollars the plaintiff is to receive the difference between what it really was and the twenty-five dollars.

119 For instance, if the testimony satisfies you that the freight is fifteen dollars, then the plaintiff would be entitled to recover ten dollars on each machine; that amount he would be entitled to receive back.

Now, relative to the machines at Beatrice, I ought to say to you that where it is shown that the defendant owned the machines, then there is but one way by which the title and ownership could be divested—by sale and delivery of the property; and though the defendants may have contracted to deliver the machines but had not delivered them, they could still make a good and valid sale. Those machines never passed from defendants until they were sold and the title passed under this agreement.

Where there is testimony tending to show that a witness makes different statements in court from what he has made out of court, it is competent to show that. Now, what is the fact here?

The witness in question, whose name I do not recollect, had his attention called directly to a conversation and he stated that he did not make the statement to which his attention was directed.

The defendants have placed three witnesses on the stand who state that they were present when he made the statements. Of course, the statements of the three witnesses are more reliable than the statement of one, unless it is sustained by the testimony of other witnesses. Now, what is the fact? There can be no controversy about the defendants owning those machines at one time, and they will be presumed to be the owners until the machines are shown to have been sold and delivered. Here they not only sold them in this case but they delivered them, and that would make a good and valid sale. The testimony does not support the plaintiff's theory upon that point.

120 Now, if you find for the plaintiff, keeping in view the principles I have stated, you find for him the difference between what he actually paid as freight and what it actually cost him to bring the machines to the places where they were found, as stated in this contract. Make allowance for the same with ten per cent. interest thereon from the 5th day of November, 1877. Again, if there are any machines missing, he would be entitled to recover the value of those machines with ten per cent. interest from the 5th of November, 1877. He would be entitled to recover the difference between the value of the machines in good condition and the condition in which they were found on the 5th of November, 1877, together with interest. Add those three items together, the measure of damages will be for the plaintiff, that sum with interest thereon. If you find for the plaintiff, your verdict will be: We find for the plaintiff and assess his damages at dollars.

It is admitted in the contract that $15.37 is due to McPherson on statement made there, and $275.00 due defendants on matters which they have settled themselves. The contract admits these things to be determined after their freight difficulties are adjusted. You ought to make full settlement of that. Add $15.37 to the amount of damages and deduct $275.00 from the whole amount.

The foregoing instructions are all the oral instructions given by the court; and to that part of the same speaking of machines, saying, "If they have been placed there since, he is not bound by that fact," the defendants at the time duly excepted; and at the said trial, at the request of the plaintiff, the following written instructions were given to the jury by the court, to the giving of each of which the defendants, at the time, duly excepted:

121 "Q. The jury is instructed that they are not permitted to take into account or make any allowance or reductions from the damages of the plaintiff for repairs of any kind made upon the machines or supplies furnished for them after Nov. 5, 1877, all such acts on their part being without authority; and the plaintiff is entitled to recover the full measure of his damages as if no such repairs had ever been made.

"10. The jury is instructed that the plaintiff is entitled to recover for any machines which were not at the places named at the time of the making of the contract of Nov. 5th, 1877, the price of said machines as fixed in the contract; and if you find that the defendants failed to deliver any of the machines to be delivered at Lewisburg, Penn., after demand made by plaintiff, the plaintiff is entitled to recover the contract price of such machines.

"11. On such machines as were delivered to the plaintiff, he is entitled to recover for any defects in quality or condition, and the measure of his damages is the difference between the value of such machines in the condition in which they then were and the contract price.

"12. Plaintiff is entitled to recover, as a part of his damages, the difference between twenty-five dollars, the estimated freight on each machine from Lewisburg, Penn., and the actual freight paid."

And at the said trial, at the request of defendants, the court gave the following written instructions:

"1. The jury are instructed that the burden of proof is on the plaintiff to prove each material allegation of the petition by a preponderance of evidence.

"2. The jury are instructed that they consider nothing as evidence in this case except what was admitted by the court as evidence
122 and only for the purpose for which the court admitted the same.

"3. The jury are instructed that if they find for the plaintiff they cannot allow any items of damages except such as was proven by a preponderance of evidence admitted on the trial.

"4. The jury are instructed that the title to all the machines included in said contract and at the several places mentioned in said contract in Kansas and Nebraska passed from the said defendant, to the said plaintiff at the making of the contract dated November 5th, 1877, and from said time the plaintiff has had the sole right to control and dispose of the same."

"5. The jury are instructed that they must find that at the making of the contract dated November 5th, 1877, the title to the 11 Marsh No. 4 and 8 Valley Chief machines at Beatrice passed from the defendants to the plaintiff unless they find from the evidence that the defendants, before that time, had sold and actually delivered the same to some other person; and it is immaterial what has become of those machines since said time.

"6. The jury are instructed that, even if they find that E. C. Marsh said the Beatrice machines had been sold, it is competent for them to find that said machines had not been sold; and they are further instructed that, as against McPherson's title received by the contract

dated November 5th, 1877, the sale to any other person would not be good without a delivery.

"7. The jury are instructed that if they find from the evidence that the defendants were negotiating for a sale of the Beatrice machines by a written contract in exchange for lands, but that such sale was never consummated by making and signing the writing, they must find there was no sale in such transaction.

123 "8. The jury are instructed that there is not sufficient evidence in this case to sustain the finding that the plaintiff, McPherson, did not become the owner of the 11 Marsh No. 4 and 8 Valley Chief machines at Beatrice at the time of the making of the contract of November 5, 1877.

"9. Unless the jury find by a preponderance of evidence that the remaining 5 Marsh No. 4 machines to be delivered on the cars at Lewisburg, Pennsylvania, have been demanded of defendant by the plaintiff, they must find that there is no liability of the defendant to the plaintiff on account thereof.

"10. The jury are instructed that they must find that the three (3) Marsh No. 4 machines ordered of defendants by plaintiff have been received by plaintiff and become the plaintiff's property when consigned to him and put on board the cars at Lewisburg, and that there is no liability of defendants on account thereof.

"11. The jury are instructed that they must find that there is due from the plaintiff, John McPherson, to the defendants two hundred and seventy-five ($275.00) dollars on the freight on the eleven (11) Marsh No. 4 machines at Beatrice, as stated in the contract dated November 5th, 1877.

"12. The jury are instructed that they cannot find that there were any liens, incumbrances, or charges against any of the machines named in the contract dated November 5th, 1877.

"14. The jury are instructed that they cannot find any amount due from the defendants to plaintiff on the second cause of action stated in the petition for freight, except as to such machines as the evidence proves the amount of freight thereon, and that such amount was below $25.00.

124 "15. The jury are instructed that proof of the freights from Lewisburg to one of the points in Kansas or Nebraska named in the contract is not proof of the amount of freight on said machines at any of the other points named in Kansas or Nebraska.

"18. The jury are instructed that they cannot find against the defendants on the first cause of action stated in the petition unless they can find a breach of the warranty in the contract dated November 5, 1877."

The foregoing oral instructions and written instructions requested and given as aforesaid are all the instructions given by the court to the jury on the said trial.

On the said trial the defendants requested the court to give each of the following instructions to the jury, all of which the court refused; to each and all of which rulings and refusals to give instructions the defendants at the time duly excepted:

"13. The jury are instructed that the plaintiff has failed to make out and prove any cause of action on the grounds stated in the second cause of action in the petition for freight.

"16. The jury are instructed that if they find there is any breach of the warranty in the contract dated November 5th, 1877, warranting that the machines are at the places named and in the condition therein

mentioned, that the defendant has the right to make good such warranty in a reasonable time by replacing missing machines and repairing and putting in good condition those not in such condition named.

"17. The jury are instructed that if they find there was any breach of the warranty named in the contract of November 5, 1877, that
125 the measure of damages for such breach is the difference in the value of such machines as they actually were and as they were warranted to be, less the benefit to the property by what the defendants have done to make good such war'anty."

In the argument of the motions to discharge the attachments herein it was contended by the defendants that that part of the statute of Nebraska authorizing the attachment of the property of a non-resident without giving the undertaking required in cases of residents was obnoxious to both the State and United States constitutions, and was void, and that the attachments were bad.

The court overruled the said motions and sustained the said attachments, to which rulings and decisions of the court the defendants at the time duly excepted.

And the said defendants, having at the time duly excepted to all the above rulings, as above shown, present to the judge of said court this their bill of exceptions, and request that the same be allowed and made part of the record of this cause. And the same having been examined by the said judge and found to be correct, is allowed and signed by me, and, on motion of defendants, is hereby ordered to be filed and made, and hereby is made, a part of the record in this cause.

ELMER S. DUNDY, *Judge.*

AUG. 7, '79. I have examined the foregoing bill of exceptions and made such corrections as I desire. The bill of exceptions was received by me on Aug. 1, 1879.

JNO. L. WEBSTER,
Att'y for Plaintiff.

Upon the back of said bill of exceptions are the following endorsements: No. 292 D. John McPherson vs. James S. Marsh and C. E. Marsh. Bill of exceptions. Filed Aug. 13, 1879. Watson B. Smith, clerk.

126 Thereupon, afterwards, to wit, on the 18th day of August, 1879, a precipe for transcript was filed in said case; which said precipe is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

JOHN MCPHERSON
vs.
JAMES S. MARSH AND E. C. MARSH. } 292 D.

Precipe for transcript for the U. S. Supreme

To the clerk of U. S. cir. court at Omaha:

Please return with the writ of error transcript of the following papers, deemed by the parties to be sufficient:

1. Transcript from State court.
2. All attachment proceedings since in U. S. court.

3. All pleadings filed after removal.
4. All journal entries except formal ones.
5. Bill of exceptions and bond & citation.
6. Motion for new trial.
7. Stipulation to extend time for bill of exceptions.

J. H. BROADY,
For Def'ts.
JNO. L. WEBSTER,
Att'y for Plaintiff.

Said precipe is endorsed as follows: John McPherson vs. Marsh & Marsh. 292 D. Precipe for transcript for U. S. Supreme Court. Filed Aug. 18, 1879. Watson B. Smith, clerk.

127 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the within writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to 114 contain true and faithful transcripts from the records and pleading, as the same remains of record and on file in said court, in the case of John McPherson vs. James S. Marsh and E. C. Marsh; and that a copy of the writ of error and citation have been lodged and remain in my said office.

Witness my hand and the seal of said court at Omaha, Nebraska, this 18th day of September, 1879.

[SEAL.] WATSON B. SMITH, *Clerk.*

128 *Assignment of errors.*

Supreme Court of the United States of the October term, A. D. 1879.

JAMES S. MARSH AND E. C. MARSH, PLAINTIFFS in error,
vs.
JOHN MCPHERSON, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said James S. Marsh and E. C. Marsh by their attorney, and say, that in the record and proceedings aforesaid, and in the said cause, there is manifest error in this, to wit:

1st. The circuit court erred in admitting in evidence against defendants' objection the testimony of the witness M. H. Brown, that on the machines at Fairmont, Nebraska, the freight from Lewisburg, Pa., to said Fairmont was $36.08.

2nd. The circuit court erred in admitting the testimony of the witness John Stobler, that the freight from Lewisburg, Pa., to Hastings, Nebraska, on the machines at Hastings would average twelve and one-half dollars.

129 3rd. The court erred in sustaining the objection of plaintiff to the question of defendants on cross-examination of the witness M. H. Brown, asking him whether in February or March, 1878, the machines at Fairmont had been put in good repairs and in good condition,

and all freights paid and missing sickles furnished by defendants, and in excluding the answer of witness thereto.

4th. The court erred in permitting the witness Stobler to answer the following question of plaintiff in reference to delivering to McPherson the machines at Hastings, as follows, to wit:

"Q. State whether or no you declined to turn them over to him.

"A. I did decline."

5th. The court erred in permitting the witness Stobler to answer the following question of plaintiff in reference to the same machines, as follows, to wit:

"Q. State up to that time what authority you had from the Marshes to turn the machines over to McPherson.

"A. I had no instructions from the Marshes to turn them over."

6th. The court erred in sustaining plaintiffs' objection to the
130 following question on cross-examination of the witness Stobler by defendant in reference to one of the machines at Hastings, which witness testified was out of repairs and missing a sickle, and in excluding the answer thereto, to wit:

"Q. Has not that machine been repaired where you say it needed paint, and was not that extra sickle furnished by the Marshes in February or March, 1878?"

7th. The court erred in overruling the defendants' objection to the following question of plaintiff in reference to the machine at Schuyler, to the witness J. F. Wood in examination-in-chief, and in permitting the answer as follows, to wit:

"Q. In the condition it was then in what would the machine be worth to sell on the market?

"(Objected to by defendants because immaterial and incompetent, and because the rule of damages would be what it would take to make it what the contract calls for. Objection overruled; to which defendants except.)"

"A. I could hardly tell. I would not want to give much for it."

8th. The court erred in sustaining plaintiff's objection to the following question asked the witness J. F. Wood, on cross-examination by defendants in reference to machine he had stated to be in bad
131 condition, and in excluding the answer, to wit:

"Q. Was it not put in good condition by the Marshes?"

9th. The court erred in sustaining the plaintiff's objection to the following question asked on cross-examination by defendants of the witness J. F. Wood in reference to said machine, and in excluding the answer, to wit:

"Q. You say there were some parts defective in the machine. Were these parts supplied?"

10th. The court erred in sustaining the plaintiff's objection to the following question, in examination-in-chief, asked by the defendants of the witness H. H. Dolan, and in excluding the answer, to wit:

"Q. State what, if anything, you know of any conversation or agreement between the Marshes and McPherson as to deficiencies on or repairing of the reapers which were scattered around over the country?

"(Objected to by plaintiff as incompetent and irrelevant and as not claimed in the answer. Objection sustained and answer excluded, to which defendants except.)"

11th. The court erred in sustaining the plaintiff's objection to the following question, in examination-in-chief, asked of the witness H.
132 H. Dolan by defendants, and in excluding the answer, to wit:

"Q. State what, if anything, you know of any agreement be-

tween the parties to this suit in relation to the settlement of a claim for freight, if any, as charged in the second cause of action in the petition.

"(Objected to by plaintiff as immaterial and incompetent. Objection sustained by the court, and answer excluded, to which defendants except.)"

12th. The court erred in sustaining the plaintiff's objection to the following question asked of the witness H. H. Dolan by defendants in the examination-in-chief, and in excluding from the jury the answer, to wit:

"Q. State what you know, if anything, about such an agreement as either the one asked about in the last above question or the last question before that one between the parties to this action after the making of the contract of November 5th, 1877, in litigation in this suit.

"(Objected to by plaintiff on same grounds as last above. Court sustained the objection, and excluded the answer, and defendants excepted.)"

13th. The court erred in sustaining the plaintiff's objection to the following question asked of the witness H. H. Dolan in examina-
133 tion-in-chief by defendant, and in excluding the answer, to wit:

"Q. State, if you know, of any such agreement or agreements as above asked for between the parties to this suit made prior to the execution of the contract of November 5th, 1877, or at that time.

"(Objected to by plaintiff as incompetent. Objection sustained by the court, and answer excluded, and defendants excepted.)"

14th. The court erred in sustaining the plaintiff's objections to each and all of the following questions relating to the cigars mentioned in the answer asked by defendants of the witness H. H. Dolan in his examination-in-chief, and excluding the answers as follows, to wit:

"Q. How much were the cigars put in at in that trade?

"(Objected to by plaintiff on the ground that there was no warranty of the cigars and of immateriality. The court sustained the objection, and excluded the answer, and defendants excepted.)

"Q. State, if you know, the quality of those cigars.

"(Objected to by plaintiff as immaterial. Court sustained the objection, and excluded the answer, and defendants excepted.)

"Q. State, if you know, there were several brands of cigars.

134 "(Objected to by plaintiff as immaterial. Court sustained the objection, and excluded the answer, and defendants excepted.)"

15th. The court erred in overruling the objection of defendants to the following question asked by plaintiff of the witness J. C. Clark in his examination-in-chief, and in permitting the answer to go in evidence as follows, to wit:

"Q. State the difference in value between a machine which has been out on trial and in use one season or two seasons, and what would be its value in good condition.

"(Objected to by defendants because the question should be confined to these particular machines, and because the damage would depend on how used. Objection was overruled, and defendants excepted.)

"A. The average difference would be about fifty dollars."

16th. The court erred in sustaining plaintiff's objection to the defendants' question to the witness James S. Marsh in his examination-in-chief, asking him whether the plaintiff knew at the time of the making of the contract that the machines in controversy were shipped to the places named in the contract in 1874, 1875, 1876, & 1877, and in excluding the answer.

17th. The court erred in sustaining plaintiff's objection to de-
135 fendants' question to the witness James S. Marsh in examination-in-chief, asking him to state the circumstances of the contracting parties at the time of making the contract involved in this litigation, and in excluding the answer.

18th. The court erred in sustaining plaintiff's objection to defendants' question to the witness James S. Marsh, defendant, in his examination-in-chief, asking him whether he knew of any dissatisfaction on McPherson's part concerning the contracts previous to the bringing of this action, and in excluding the answer.

19th. The court erred in sustaining plaintiff's objection to the following question by defendant relating to a meeting between the parties January 19th, 1878, asked of witness James S. Marsh in his examination-in-chief, and in excluding the answer, to wit:

"Q. State whether you and McPherson agreed upon any settlement of the difficulties between you involved in this action.

(Objected to by plaintiff as immaterial. Court sustained the objection and excluded the answer, and defendants excepted.)"

20th. The court erred in sustaining plaintiff's objection to the following question relating to the same meeting of the parties January 19th, 1878, asked by defendants of witness James S. Marsh
136 in examination-in-chief, and in excluding the answer, to wit:

"Q. State whether you agreed at that time as to how you should stand good to McPherson in case that deficiencies in the machines should be found or machines be out of repair.

"(Objected to by plaintiff as incompetent and immaterial. Court sustained the objection and excluded the answer, and defendants excepted.)"

21st. The court erred in sustaining the plaintiff's objections to defendants' question to the witness James S. Marsh in examination-in-chief, asking whether the plaintiff at the making of the contract in litigation made any representations as to the cigars aforesaid, and in excluding the answer.

22nd. The court erred in sustaining plaintiff's objection to the following question by defendants asked, in examination-in-chief of the witness J. C. Clark, relating to the machines in controversy, and in excluding the answer, to wit:

"Q. State about the cash value of these Valley Chief reapers Nos. one & two in Nebraska, about November, 1877, at such places as are named in this contract.

"(Objected to by plaintiff as incompetent and immaterial. Court sustained the objection and excluded the answer, and defendants excepted.)"

137 23rd. The court erred in its oral instruction to the jury, that if they (the machines) have been placed there since (since the making of the contract sued on), he (the plaintiff) is not bound by that fact.

24th. The court erred in giving to the jury the following instruction requested by plaintiff, to wit:

"The jury are instructed that they are not permitted to take into account or make any allowance or reductions from the damages of the plaintiff for repairs of any kind made upon the machines or supplies furnished for them after Nov. 5, 1877, all such acts on their part being without authority, and the plaintiff is entitled to recover the full measure of his damages as if no such repairs had ever been made."

25th. The court erred in giving to the jury the following instruction requested by plaintiff, to wit:

"He is instructed that the plaintiff is entitled to recover for any machines which were not at the places named at the time of the making of the contract of Nov. 5th, 1877, the price of said machines as fixed in the contract, and if you find that the defendants failed to deliver any of the machines to be delivered at Lewisburg, Pa., after demand made by plaintiff, the plaintiff is entitled to recover the contract price of such machines."

138 26th. The court erred in giving to the jury the following instruction requested by the plaintiff, to wit:

"On such machines as were delivered to the plaintiff he is entitled to recover for any defects in quality or condition, and the measure of his damages is the difference between the value of such machines in the condition in which they then were and the contract price."

27th. The court erred in giving to the jury the following instruction requested by the plaintiff, to wit:

"Plaintiff is entitled to recover as a part of his damages the difference between twenty-five dollars, the estimated freight on each machine from Lewisburg, Penn., and the actual freight paid."

28th. The court erred in refusing to give to the jury the following instruction requested by defendants, to wit:

"The jury are instructed that the plaintiff has failed to make out and prove any cause of action on the grounds stated in the second cause of action in the petition for freight."

29th. The court erred in refusing to give the following instruction requested by defendants, to wit:

"The jury are instructed that if they find there is any breach of the warranty in the contract dated November 5th, 1877, warranting

139 that the machines are at the places named, and in the condition therein mentioned, that the defendant has the right to make good such warranty in a reasonable time by replacing missing machines, and repairing and putting in good condition those not in such condition named."

30th. The court erred in refusing to give to the jury the following instruction requested by defendants, to wit:

"The jury are instructed that if they find there was any breach of the warranty named in the contract of November 5th, 1877, that the measure of damages for such breach is the difference in the value of such machines as they actually were, and as they were warranted to be less the benefit to the property by what the defendants have done to make good such warranty."

31st. The court erred in overruling defendants' first motion to discharge the attachment, and in sustaining the said attachment, and in holding the attachment good without the undertaking in attachment required by the laws of Nebraska in cases against residents.

32nd. The court erred in overruling the motion to discharge each and all the alias attachments, and in sustaining each and holding them good.

140 33rd. The court erred in rendering judgment and order of sale on the verdict, and attachments in favor of plaintiff and against defendants.

SUMMARY.

The above specifications may be classified as follows:

1st. Error in holding that a recovery could be had for deficiencies in freights on second cause of action.

2nd. Error in refusing to let the circumstances of the parties at the time of the making of the contract sued on be shown.

3rd. Error in refusing to permit proof of the unwritten contracts and liabilities averred in the answer, or what was done thereunder, or in fulfillment of the warranty in the contract, or any benefit to defendants thereby.

4th. Error in holding the contract price conclusive evidence of the value of the machines, and in refusing evidence of the actual value, and in stating the rule of damages when the machines were not as called for by the contract to be the difference between their actual value in such defective condition and the price stated in the contract.

141 5th. Error in sustaining and holding good the attachments against the defendants, who were and are non-residents of Nebraska and citizens of Pennsylvania, without an indemnity bond against wrongful attachment, such as residents are entitled to by right.

And the said James S. Marsh and E. C. Marsh, plaintiffs in error, pray that the judgments and orders aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of said judgment or order.

A. J. POPPLETON,
Counsel for Plaintiff' in Error.

(Indorsed:) James S. Marsh and E. C. Marsh, pl'ffs in error, vs. John McPherson, def't in error. Supreme Court U. S. 1879, Oct. term. No. 871. Assignment of errors. Filed 2' October, 1879. A. J. Poppleton, counsel for pl'ff' in error.

(Indorsement on cover:) No. 282. James S. Marsh and E. C. Marsh, plaintiffs in error, vs. John McPherson. Nebraska C. C. U. S. Filed 2nd October, 1879.

FILED
MAR 20 1882
JAMES H. MCKENNEY, Clerk

UNITED STATES SUPREME COURT.

No. 282.

JAMES S. MARSH AND E. C. MARSH, PLAINTIFFS IN ERROR.

vs.

JOHN McPHERSON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

BY J. H. BROADY.

CRANDER PRINT, ENDWVILLE, NEBRASKA.

IN THE

UNITED STATES SUPREME COURT.

JAMES S. MARSH AND E. C. MARSH, PLAINTIFFS IN ERROR,

vs.

JOHN McPHERSON, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

STATEMENT OF CASE.

On the 15th day of January, 1878, defendant in error filed his petition against plaintiff in error in these words:

"John McPherson, plaintiff, complains of James S. Marsh and E. C. Marsh, whose first name is to plaintiff unknown, defendants, and for his cause of action against them avers that on the 16th day of October, 1877, this plaintiff and said defendants entered into a contract in writing of the tenor and effect following, to-wit:

"This agreement by and between John McPherson, of Nebraska, of the first part, and James S. Marsh and E. C. Marsh, of Pennsylvania, of the second part, witnesseth:

"That the said party of the first part, in consideration of the covenants of the said parties of the second part, as hereinafter stated, hereby covenants and agrees to sell and convey to the said parties of the second part by a good and sufficient deed of conveyance, with full covenant of warranty, excepting taxes, and free from all incumbrances except taxes, the following described real estate, situated in Nemaha County, Nebraska, to-wit:

"Lots seven (7) and eight (8) and two and one-half feet wide off the east side of lot six, all in block (3) in the city of Brownville, in Nemaha County, Nebraska, together with all the privileges, buildings, and appurtenances thereunto belonging, and in addition thereto one-half of the stock of goods now in the store of the said party of the first part, on the said real estate at an invoice at cost with fair deductions for damages to goods since in store.

"And also for the same consideration aforesaid, the party of the first part covenants and agrees to cause to be duly conveyed to said parties of the second part all his right, title, and interest in and to the island in the Missouri River in Nemaha County, Nebraska, known as the Sonora Island, supposed to be six hundred and seventy acres of land. Also for the consideration aforesaid, the said party of the first part sells, assigns, and conveys unto the said parties of the second part the claim of the said party of the first part against the estate of Evan Worthing, now in litigation in Franklin County, Nebraska. In consideration of the said covenants of the said party of the first part, the said parties of the second part do hereby covenant and agree to pay the said party of the first part the consideration for the said property so as aforesaid conveyed to them by the said party of the first part, as follows:

"For the said real estate in the said city of Brownville, eighteen thousand one hundred and ninety dollars and thirty-seven cents (18,190.37) in combined reapers and mowers and self rakers, known as the 'Valley Chief,' as follows: Said machines number one to be taken at one hundred and seventy-five dollars each, and said machines number two to be taken at one hundred and seventy dollars each, to be delivered at the following places, to-wit:

Place of delivery.	Number of machines.	
	No. one.	No. two.
Sabetha, Kansas	1	1
Fairbury, Nebraska	.....	1
Carleton, Nebraska	...	5
Edgar	1	1
Hastings, Nebraska	17	.....
Hebron, Nebraska	1	.....
Kearney, Nebraska	2	5
Fairmont, Nebraska	2	.....
Aurora	1	.....
York, Nebraska	1	.....
Crete, Nebraska	2	.....
Seward, Nebraska	1	1
Nebraska City, Nebraska	1	.....
Lincoln, Nebraska	13	.....
Elk Creek, Nebraska	1	.....
Beatrice, Nebraska	8	.....
Omaha, Nebraska	2	.....
Columbus, Nebraska	5	.....
Grand Island, Nebraska	5	6
Dannebrag, Nebraska	1	.....
Schuyler, Nebraska	1	.....
Fremont, Nebraska	9	.....
West Point, Nebraska	5	.....
Wahoo, Nebraska	4	.....
Total number	86	20

"Eighty-six machines number one, and twenty machines number two, all of the said machines to be delivered in good condition and free of all incumbrances and clear of and free from the taxes of 1878 and all previous years and clear and free of all claims of freight and each machine to have two smooth sickles and one sickle edge sickle. In this agreement the freight of each machine from the manufactory at Lewisburg, Union County, Pennsylvania, to the said place of delivery as aforesaid is estimated at twenty-five dollars and in each and all cases when such freights fall below said estimate of twenty-five dollars the parties of the second part shall pay such deficiency below twenty-five dollars in money to the party of the first part. The said surplus of two hundred and fifty-nine dollars and sixty-three cents of the said agreed value of said machines over and above the said agreed value of said real estate in said city of Brownville, to be applied in paying for said real estate, in said Sonora Island, as hereinafter stated.

"For the said store property conveyed to them, as aforesaid, the said parties of the second part agree to pay the said party of the first part the price aforesaid, one thousand dollars in cash, November first, 1877, and the balance in thirty days thereafter without interest before due; for the said real estate in Sonora Island, conveyed to them as aforesaid, the said parties of the second part agree to pay the said party of the first part three thousand six hundred dollars ($3,600) as follows, two hundred and fifty-nine dollars and sixty-three cents in the said surplus of machines above mentioned, and the balance in the said Valley Chief machines of the kind now called Marsh number 4, at the agreed price of one hundred and seventy-five dollars each, with four sickles each, two for reaping and two for mowing, to be delivered in good condition, free of incumbrances, the same as the Valley Chief machines above mentioned, at the following places, to wit, eleven at Beatrice, Nebraska, provided that on this eleven the said party of the first part shall pay the freight from said Lewisburg to said Beatrice, and the balance on board the cars at said Lewisburg, consigned to said party of the first part and subject to his order. For the said claim against the estate of said Evan Worthing assigned to them the parties of the second part agree to pay all cost and expenses therein, subsequent to the decision of the county court of Franklin County, Nebraska, and take it with said other property above named in consideration of their covenants hereinbefore stated.

"In witness whereof the said party of the first part and the said parties of the second part hereby affix their hands and seals this October 16th, 1877.

"JOHN McPHERSON. [SEAL.]
"E. C. MARSH. [SEAL.]
"JAMES S. MARSH. [SEAL.]

"Witness J. H. BROADY to first two signatures, also to third signature."

"That at the date of the execution of said agreement aforesaid said defendants represented to this plaintiff, that they (the defendants) would at once proceed to visit each of the points named in said writing aforesaid, where said machines then were and at which places they were to be turned over to this plaintiff as stated in said writing, and would make settlement, with their agents then and theretofore having charge of said

agricultural machines, and would pay off and discharge all claims and liens of every kind and sort upon each and all of said machines and put in good condition and repair, each and all of said machines so as to have the same conform to the conditions of said agreement in writing. That about the 5th day of November, 1877, said defendants falsely and fraudulently represented to this plaintiff that they had made settlements with each and all of their said agents, at the several points in said written agreement named, and that they had adjusted and paid all liens and claims upon each and all of said machines of every kind, whatsoever, and that all of said machines were in good condition, and free of all incumbrances, and clear and free from the taxes of 1878, and all previous years and free and clear of all claims for freight, and that each machine had two smooth sickles, and one sickle with sickle edge. Plaintiff further avers having full faith and confidence in said statements and declarations of said defendants aforesaid made; that he believing and relying upon the truth of the same accepted and acted upon said statements and representations as true; whereas in truth and in fact said representations and statements were false and fraudulent, as will more fully hereinafter appear, and that by reason of the premises this plaintiff was mislead and deceived and damaged, as is hereinafter more fully set forth. That at said time this plaintiff had no knowledge of said facts and the condition of said machines, and had no means of acquiring the same, other than said statements and representations so made by said defendants, and this each of said defendants well knew when they so made said false and fraudulent representations and statements and the same were so made to deceive this plaintiff. That afterwards and on or about the 5th day of November, 1877, this plaintiff, relying upon the truth of said representations and statements as aforesaid, did convey to said defendants by good and sufficient deed all said real estate in said written agreement aforesaid described to be so conveyed by said plaintiff to said defendants. The said plaintiff and said defendants did have one-half of said stock of goods in said written agreement appraised and at the sum of $4242.10 and the plaintiff did at said time turn the same over to said defendants at said appraised value of $4,242.10 plaintiff

further saith that he did perform all and singular the covenants and agreements on his part to be performed and kept. That at the date of the performance of said covenants and agreements on the part of this plaintiff said defendants did, by their written agreement, dated November 5th, 1877, acknowledge payment for all of said machines named in the list in said first contract, aggregating eighty-six number ones and twenty number twos, and did authorize said plaintiff to receive the same at the places named in said first contract free and clear of all liens or taxes up to, and including taxes for 1878, and in good order and condition, as set forth in said first contract. That in said last agreement said defendants did also authorize this plaintiff to receive said eleven machines, called Marsh number 4, at Beatrice, and did further agree to deliver to plaintiff on the cars in Pennsylvania eight machines number four, and that said defendants did, in said last agreement covenant and warrant that said eighty-six number ones and twenty number twos and eleven number fours were all at the places named aforesaid and were in good condition for delivery as provided in said agreement first made, and that said eight "number fours" should be delivered as aforesaid, and that they (the said defendants) would stand good to this plaintiff for any breach or failure of said warranty; that said machines aforesaid, at the agreed price aforesaid, set forth in said contracts aggregate the value and sum of $21,775.00, and the plaintiff, upon information and belief, avers the fact to be that said machines were then of the value of $21,775, when put in good condition and free from all liens as provided in said contracts and that said defendants received said property so conveyed to them as aforesaid by this plaintiff in full payment for all said machines; that since said date this plaintiff has demanded said machines at said several places named in said agreement, and in the number and in the condition therein set forth including the eight machines to be shipped from Lewisburg and 30 days prior to commencement of this suit, but plaintiff avers the fact to be that said machines at each of said places named were in the charge of and under the control of agents of said defendants; that each and all of said machines were encumbered by liens for freight and for storage, and commissions due such agents, and

that the same were in bad condition from exposure and age, and that said machines were not complete in many particulars, and that at many of said places there were not the number of machines named in said contract. Plaintiff further avers the fact to be, that said agents of said defendants as aforesaid, and said defendants, although requested by plaintiff, refused and do still refuse to deliver said machines or any part thereof to this plaintiff, and that by reason of the premises he has been damaged in the sum of $21,775.00.

II. Plaintiff further avers that by the terms of said contract the freight on said 86 number ones, and 20 number twos, and 11 number fours was estimated at $25.00 each, and so added in to the price for which this plaintiff paid said defendants, and that if said freight did in fact fall below said $25.00 the said defendants were to pay to this plaintiff the difference between said $25.00 and the actual freight on each of said machines as is in detail set forth in said contract, hereinbefore set out. This plaintiff avers that in truth and in fact said freight on each of said machines did not average over $12.50 whereby by the terms of said contract this plaintiff has become entitled to have and recover of said defendants the further sum of $1,462.00. Wherefore plaintiff prays judgment against said defendants for the sum of twenty-three thousand two hundred and thirty-seven dollars ($23,237), with interest from the 5th day of November, 1877."

June 2d, 1879, defendant in error so amended his said petition as to state that on the 7th day of November, 1877, he demanded five of the eight machines at Lewisburg, Pa., which demand was refused.

At the same time of filing said petition defendant in error filed his affidavit for attachment, in which he stated his grounds for attachment in these words: "That the said James S. Marsh and E. C. Marsh, the defendants in this action, are both of them non-residents of the state of Nebraska, and are both residents of the state of Pennsylvania." (Record page 14.) At the same time of filing said affidavit and by virtue thereof defendant in error obtained an order of attachment, under which among other things, perishable personal property consisting of merchandise of the appraised value of $1,372.38 was taken and held and afterwards under order of court sold by the officer as perishable property. Under other subsequent at-

tachments, all founded on the above mentioned affidavit, the plaintiff attached lands and other personal property.

February 16th, 1878 plaintiff in error, moved to discharge the attachments because there was no undertaking for attachment.

March 18th, 1878, plaintiff in error filed petition for removal of cause to United States circuit court, alleging therein, among other things, that at the commencement of the suit they, James S. Marsh and E. C. Marsh were, and still are citizens of the state of Pennsylvania. The cause was accordingly removed.

April 23d, 1879, plaintiff in error answered the petition in these words:

"Defendants admit the execution of the contract dated October 16th, 1877, set out in full in the petition.

That the said contract dated October 16th, 1877, was fully executed, fulfilled, superceded, and dispensed with by the further agreement between the parties duly executed and endorsed thereon in these words, to-wit:

"BROWNVILLE, NEBRASKA, November 5th, 1877.

"The above contract is this day executed by the said parties thereto as follows: The within-named real estate is conveyed by said first party (McPherson) to said second parties (Marsh and Marsh) also one-half of said stock of goods at an invoice in the sum of four thousand and two hundred and forty-three and 10-100 dollars making price of the half, four thousand two hundred and forty-three and 10-100 ($4,243.10) dollars, is delivered by McPherson to said parties, Marsh and Marsh.

"The said second parties Marsh and Marsh hereby acknowledge payment of all said machines named in the list within named, aggregating eighty-six number ones, twenty number twos, and hereby deliver all thereof to said first party at the places named in said within list (except there is two instead of one at Donnebrag and three instead of four at Wahoo, which change is consented to by the parties) free and clear of all liens, charges, or taxes up to and including taxes for the year 1878, as per within contract. Said second parties also hereby deliver to said first party eleven of said machines within named, called Marsh number four, as provided for within and on the within-named terms therefor at Beatrice. On

this, eleven machines number four, there is two hundred and seventy-five dollars freight in favor of said second parties, to whom said first party shall account therefor as hereinafter stated.

"The balance of $259.63 on the said list of number ones and number twos, and the said eleven number fours, amounting to $1,925.00 is applied on the purchase price of said lands in Sonora Island, leaving balance of $1,415.37, for which said second parties shall deliver as provided for within, eight of said machines number four, on board the cars in Pennsylvania, at place within named, leaving still a balance on said purchase price of island real estate of $15.37 in favor of said first party to whom the second parties shall account. As soon as the amount due said first party on freights of said number ones and twos are ascertained, the same with the said $275.00 due second parties and said $15.37 due said first party shall be settled and adjusted by the parties. Said eight number fours to be delivered within thirty days after notice to second parties. Said second parties hereby warrant that said eighty-six number ones and twenty number twos and eleven number fours are now at the places above-named in condition for delivery as above and within provided for, and that said eight number fours shall be delivered as above stated and shall stand good to said first party for any breaches of failures of such warranty and promise.

"On said store goods one thousand dollars is paid to said first party the receipt of which is hereby acknowledged and the balance shall be paid according to the within contract.

"JOHN McPHERSON.
"JAMES S. MARSH.
"E. C. MARSH."

On the said contract the following agreement was indorsed by plaintiff, to-wit:

"Received of said second parties, Marsh and Marsh, in full payment and settlement of said balance due for said store goods, after said payment of one thousand dollars, the following described notes of this date made by James S. Marsh, to my order, to-wit, one for $1,056.44, one for $915.72, one for $685.47, and one for $585.47, in all four several promissory notes for said amounts, all due December 1, 1877, with interest at ten per cent. per annum after maturity.

"November 7, 1877.

"JOHN McPHERSON.

"Witness:

"WILLIAM. H. HOOVER."

The foregoing agreements dated November 5, 1877, and November 7, 1877, were both one contract made and delivered together at one and the same time on the seventh day of November, 1877, after they were both signed and their making and delivery were parts of one and the same transaction in which the deed to real estate from plaintiff to defendants mentioned in the petition was executed and the execution of the said deed is a part of the same transaction last aforesaid.

The defendants aver that they duly performed all the conditions of said contracts on their parts to be performed and admit that plaintiff conveyed the real estate and one-half stock of goods described in the petition to defendants. But allege that of the said amount, so paid for goods as stated in said agreement dated November 5th, 1877, eleven hundred dollars were for cigars which constituted a part of the said goods, which cigars were sold as of the following brands and as composed of the following material, to-wit:

Fruits & flowers, Havana filler and Connecticut wrapper and binder	3,000
Flora Del Fuma, Havana filler and Connecticut wrapper and binder	7,400
Governor's choice, Havana filler and Connecticut wrapper and binder	4,300
Henry Clay, Havana filler and Connecticut wrapper and binder	3,700
McPherson's best, Yara filler and Connecticut wrapper and binder	1,050
Just out, Clear Connecticut	5,300
Gold medal, clear Connecticut	4,500
Gems, clear Connecticut	900
Nebraska pets, clear Connecticut	3,100

And by the said plaintiff at the time represented and warranted to be of the grade above named and the prices of such grades of cigars as above given were given in said trade for the said cigars. That the said cigars were not of the grade above named and none of them were of clear Havana filling, but on the contrary all the above cigars represented as of clear

Havana filling, the fillings were as much as half seed filling which seed filling is of a greatly inferior material to Havana filling.

That by reason of the said filling of seed tobacco instead of Havana tobacco, the said cigars were not worth one-half what they would have been worth had they come up to the said brands and to said representation of plaintiff, all of which plaintiff then well knew. Defendants relying and believing said brands were what they were represented to be, and that said representations were true, were thereby induced to purchase the same in said trade for eleven hundred dollars, and were thereby damaged and injured in the sum of five hundred and fifty dollars.

Defendants deny each and every allegation contained in the petition which is not expressly admitted in this answer.

Defendants aver that the said transactions between plaintiff and defendants were neither sales of the said plaintiff's lands and goods nor sales of defendants' machines, but were barters of the property of one in exchange for the property of the others, in which the prices fixed were largely in excess of cash prices, so much so that neither would have bought the property of the other for cash at such prices, and that the naming of prices in the transaction was nothing more than a matter of convenience in executing the exchange.

Defendants further say that of the said eight Marsh number four reapers and mowers to be delivered as aforesaid on board the cars at Lewisburg, Pennsylvania, the plaintiff has received of defendants three thereof, and has wholly failed, refused, and neglected to order, as provided in said agreement of November 5th, 1877, any more thereof, and the defendants have always stood ready, willing, and anxious to fill any order thereof that plaintiff might make pursuant to said agreement of November 5th, 1877, and ready and willing and anxious to comply with all the terms of said contract of November 5th, 1877, and held the said machines always in readiness therefor, and still hold them in readiness, and hereby offer the same when ordered as in said contract specified.

Defendants admit that after the making of said agreement in November, 1877, defendants told plaintiff that they (the defendants) would visit each of the points named in said writing where said machines then were,

and at which places they were delivered as stated in said writings, and if any agents were not settled with, or any liens or charges were claimed against any of said machines, would make settlement with their said agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all unpaid claims and liens of any *of every* kind and sort upon each and all of said machines, and put in good repair each and all of the said machines, so as to have the same conform to the conditions of said machines; so as to have the same conform to the conditions of said agreement and warranty in writing, but deny that they ever so stated until after said writing of November, 1877, or that they told plaintiff that they would do so at once, but aver that they stated that they would do so in a reasonable time to have them so repaired and in good condition for the first season and time for selling reapers and mowers; which season, defendants aver, was the latter part of the spring of 1878, continuing from thence through the summer of 1878, and aver that said promise was to so repair and fit up said reapers and mowers ready for the harvest of small grains in the year 1878, and for the sales for such harvest, which time commenced about May, 1878, and continued during such harvest; all of which was agreed to between the parties hereto as satisfactory, as making good the warranty of defendants in said agreement dated November 5th, 1877, all of which said promises these defendants have fully performed and complied with, and have previous to said time and previous to the commencement of the reaper and mower trade for 1878, and previous to April, 1878, visited each of the points named in said writing, dated October 6th, 1877, where said machines then were, and made settlements with their agents then and there having charge of said agricultural machines, where settlements had not already and heretofore been made with such agents, and paid off and discharged all claims and liens of every kind and sort upon each and all of said machines, and put in good condition and repair each and all of said machines, wherever any such claims or liens were unpaid and wherever any of said machines were not in good condition or were out of repair, and had all said machines as aforesaid discharged of all claims and liens of any and every sort, and in good repair and condition for the 1878 market, in due time for such market and pursuant to such promise."

On the 30th day of May, 1879, said answer was amended by adding thereto the additional averments that the said agreement and contract to put machines in good condition and repair in satisfaction of the warranty in the writing extended to and covered the replacing of missing machines and was not only made at the time and as stated in the original answer, but was repeatedly made at the time of the making of the written contract copied in the answer and both before and after that time, and that plaintiffs in error duly executed and performed said contract according to the agreement by supplying missing machines and putting all in good condition that were not in good condition, &c., and within the time agreed, &c., and the further averments, "That at the time of the making the contract copied in said original answer, and before and after that time, it was agreed by and between the plaintiff and defendants, that the difference, if any between twenty-five dollars and the actual freights on the Valley Chief machines, upon which plaintiff founds his second cause of action, should be settled when the taxes on the same machines for 1878 could be ascertained, which was not sooner than July 1st, 1878, and that if there was any liability of defendants on account of such freights, that defendants should have until the time last aforesaid to settle or pay the same." (Record page 48.)

The reply of defendant in error admits the writings pleaded in the answer dated November 5th, 1877, and November 7th, 1877, and states that they constitute the last and final agreement between the parties, and denies all other averments of the answer.

May 20th, 1879, plaintiffs in error moved to discharge all the said attachments issued after the commencement of the action for want of an undertaking in attachment. Concerning the attachment the bill of exceptions states: "In the arguments of the motions to discharge attachments herein it was contended by the defendants that, that part of the statute of Nebraska authorizing the attachment of the property of a non-resident, without giving the undertaking, required in cases of residents, was obnoxious to both the state and United State constitutions, and was void and that the attachments were bad. The court overruled the said motions and sustained the said attachments to which rulings and decisions

of the court the defendants at the time duly excepted." (Record page 72.)

The cause was tried to a jury. Defendants offered evidence of all the new or affirmative matter pleaded in their answer, all of which the court excluded on the ground that the same was immaterial and constituted no defense. Defendants also offered to prove by parol evidence the value of the machines mentioned in the pleadings, which evidence the court excluded on the ground that the prices named in the written contracts were conclusive evidence of the value thereof. Defendants also offered to prove by parol evidence the surrounding circumstances and the situation of the parties and things at the time of the making of the written contracts, to put the court in the situation of the parties there, which the court excluded on the grounds of immateriality and that the writings alone must speak. Against exceptions of plaintiffs in error, the court among other things charged the jury according to said rulings as hereinafter mentioned. Various objections and exceptions taken by plaintiffs in error, to the introduction and exclusion of testimony and various exceptions by plaintiff in error to the charges given and refused by the court, all of which appear in full in the bill of exceptions (pages 62 to 72 inclusive) will be more particularly noted in the assignment of errors.

Assignment of Errors.

Plaintiffs in error assign as error the following:

I.

The court erred in overruling the motions to dischaage the attachments, and in sustaining the attachments. (Record 60 and 72.)

II.

The court erred in holding that a recovery could be had on the second cause of action in petition of defendants in error for freights, which errors occurred as follows: Plaintiffs in error contend that inasmuch as by the terms of the written contracts between the parties (record 36) there were further acts to be done between the parties in relation to the difference in freight sued for in second cause, to wit, in ascertaining the exact amount of freight and in presenting the same for allowance and settlement and making demand before an action will be, and to this extent the contract was executory. That there should have been averments in the peti-

tion of defendants in error, that these things had been done previous to commencing the suit, and for the want of such averments the petition fails to state a cause of action on that subject. This construction of the contract is confirmed by the clause (record page 5 and 36) covering also the taxes for 1878 which could not be determined until July, 1878 (six months after commencement of the action) as shown by the following sections of Nebraska statute:

"Sec. 15. All personal property is to be listed, assessed, and taxed in the county where the owner resides, on the first of March of the the then current year." (Gen. Stat., page 900.)

"Sec. 32. On the first Monday of July in each year the county commissioners shall meet at the county seat to levy the necessary taxes for the current year and may levy the taxes at any time after the first Monday of July." (Gen. Stat., page 909.)

The court erred in admitting the testimony of following witnesses as to freights to sustain the said second cause of action, to wit: M. H. Brown, (page 62) W. T. Stover, (page 63) John Stabler, (page 63.) The court also erred in instructing the jury at request of defendant in error as follows: (Page 70.)

"12. Plaintiff is entitled to recover as a part of his damages, the difference between twenty-five dollars, the estimated freight on each machine from Lewisburg, Penn., and the actual freight paid."

The court also erred in refusing the following charge requested by plaintiffs in error: (Page 71.)

"13. The jury are instructed that the plaintiff has failed to make out and prove any cause of action on the grounds stated in the second cause of action in the petition for freight."

III.

The court erred in excluding the testimony of James S. Marsh, one of the defendants and contracting parties, to show the circumstances surrounding the parties while making the agreements. (Record page 66.)

IV.

The court erred in excluding evidence of the accord and satisfaction, the unwritten agreements averred in the answer, what was done thereunder

the liability for misrepresentations and deceit in relation to the cigars, the fulfillment of the warranty as to the machines or of any benefit to defendants arising from such fulfillment, which several errors and how they arose are more particularly specified as follows:

The witness, M. H. Brown, having testified that two of the machines involved in this litigation were out of repair and missing a sickle, the court erred in excluding his tertimony that plaintiffs in error had repaired the same and furnished the sickle. (Record pages 62 and 63.)

The witness, John Stabler, having testified that one of the machines involved in this litigation was out of repair and missing one sickle, the court erred in excluding and preventing his answering this question.

Q. "Has not that machine been repaired where you say it needed paint? Was not the extra sickle furnished by the Marshs in February or March, 1878? (Record pages 63 and 64.)

The witness, John F. Wood, having sworn that he had one of said machines at Schuyler, Nebraska, and that it was out of repair and missing in some parts, the court erred in excluding and preventing his answering these questions in reference thereto:

Q. "Was it not put in good condition by the Marshs?"

Q. "Were not those parts supplied?" (Record page 64.)

The witness, J. J. Carpenter, having testified that nine of said machines at Fremont were out of repair and that plaintiffs in error put the same in good condition in March and April, 1878, the court struck out and took from the jury that part of his testimony relating to the putting of the machines in repair. This was error. (Record page 64.)

The witness, W. J. Kennedy, having testified that two of said machines at Omaha in his possession were out of repair, the court erred in excluding and preventing his answer to this question: (Record page 64.)

Q. "Those that were needing repairs—were those repairs made by the Marshs? Has that rake platform that you say was needed been furnished?"

The witness, H. H. Dolen, having testified that he was present part of the time during the transactions between the parties involved in this action and was clerking for defendant in error in a dry goods trade, &c., the

court erred in excluding and preventing his answers to each of the following questions:

Q. "State what, if anything, you know of any conversation or agreement between the Marshes and McPherson as to deficiencies or repairing for the reapers which were scattered around the country?"

Q. "State what, if anything, you know of any agreement between the parties to this suit in relation to the settlement of a claim for freights, if any, as charged in the second cause of action?"

Q. "State what you know, if anything, about such an agreement as either the one I asked about in the last question or the last question before that, between the parties to this suit after the making of the contract of November 5th, 1877, or at that time?"

Q. "State if you know of any such verbal agreement or agreements as asked for between the parties to this suit made prior to the execution of the contract of November 5th, 1877, or at that time?"

Q. "How much were those cigars put in at in that trade?"

Q. "State what you know of the quality of those cigars?"

Q. "State if you know there were several brands of cigars?" (Pages 65 and 66.)

James S. Marsh having sworn that he was a party to the suit and to the written contracts and that those contracts were agreed upon November 5th, 1877, the court erred in excluding and preventing his answers to each of the following questions:

Q. "State whether you and McPherson agreed upon any settlement of the difficulties between you involved in this action?"

Q "State whether you agreed at that time in reference to how you should stand good to McPherson in case that deficiencies in the machines should be found, or machines out of repair?"

Q. "State whether at that time McPherson made any representations as to cigars in the store?" (Page 66.)

The court erred in charging the jury in reference to replacing missing machines, as follows:

"If they have been placed there since, the defendant in error is not bound by that fact." (Page 68.)

The court erred in instructing the jury at request of defendant in error, as follows:

9. "The jury is instructed that they are not permitted to take into account or make any allowance or reduction from the damages of the plaintiff for repairs of any kind made upon the machines or supplies furnished for them after November 5th, 1877, all such acts on their part being without authority, and the plaintiff is entitled to recover the full measure as if no such repairs had ever been made." (Page 70.)

The court erred in instructing the jury at request of defendant in error, as follows:

10. "The jury is instructed that the plaintiff is entitled to recover for any machines which were not at the places named at the time of the contract of November 5th, 1877, the price of said machines, as fixed in said contract; and if you find that the defendants failed to deliver any of the machines to be delivered at Lewisburg, Pennsylvania, after demand made by plaintiff, the plaintiff is entitled to recover the entire price of said machines." (Page 70.)

The court erred in refusing the request of the plaintiffs in error for an instruction to the jury as follows:

16. "The jury are instructed that if they find there is any breach of the warranty in the contract dated November 5th, 1877, warranting that the machines are at the places named and in the condition therein mentioned, that the defendant had the right to make good such warranty in a reasonable time by replacing missing machines and repairing and putting in good condition those not in such condition named. (Pages 71 and 72.)

The court erred in refusing the request of plaintiffs in error for an instruction to the jury as follows:

17. "The jury are instructed that if they find there was any breach of the warranty named in the contract of November 5th, 1877 that the measure of damages for such breach is the difference in value of such machines as they actually were and as they were warranted to be, less the benefit to the property by what the defendants have done to make good such warranty." (Page 72.)

V.

The court erred in holding that the price named in the written contract was conclusive evidence of the value of the machines, and in refusing evidence of the real actual value and in stating the rule of damages, when the machines were not in the condition named by the contract, to be the difference between their actual value in such defective condition, and the price named in the contract and otherwise erred on the question of damages, all of which is more particularly specified as follows:

There having been evidence admitted in the case tending to prove that many of the machines involved in the action were out of repair or missing in parts, or otherwise not in as good condition as named in the contract, and that said Clark had been the general agent of plaintiff in error for Nebraska, and that said Clark had control of said machines from the time they were put at the places named in the contract till the time of the making of the written agreements copied in the pleadings, and that said Clark was acquainted with the values of the said machines at that time, the plaintiffs in error introduced the said Clark and had him sworn as their witness, and among other things asked him this question for the purpose of showing that the values of the said machines were less than the prices named in the contracts copied in the pleadings:

Q. "State the cash value of the Valley Chief reapers numbers one and two about November, 1877, in Nebraska, at such places as are named in this contract between the parties to this suit?"

To this question defendant in error objected as incompetent and immaterial, which objection the court sustained and excluded the answer, to which rulings plaintiffs in error at the time excepted. (Page 66.) In this ruling the court erred.

John F. Wood, a witness for defendant in error, having among other things, sworn that he had one of the said machines at Schuyler, Nebraska, which was out of repair, was by defendant in error asked this question:

Q. "In the condition it was then in, what would that machine be worth to sell it on the market?"

To this question these plaintiffs in error objected as immaterial and incompetent, and because the rule of damages would be what it would take to make it what the contract called for, which objection the court overruled

and admitted in evidence, over the exception of these plaintiffs in error, the answer which was as follows:

A. "I could hardly tell. I would not want to give very much for it."

The court erred in giving, at request of defendant in error, the instruction on page 70 of the record marked 10 and hereinbefore copied in IVth specification, and also erred in giving at the request of defendant in error the following instruction:

11. On such machines as were delivered to the plaintiff, he is entitled to recover for any defects in quality or condition, and the measure of his damages is the difference between the value of such machines in the condition in which they then were, and the contract price." (Page 70.)

The court erred in refusing the request of plaintiffs in error for the instruction marked 17 on page 72 of the record and copied in full above page 15 in IVth specification.

MEASURE OF DAMAGES.

If the action below had been rescinding the contract and for the price paid as money had and received in the nature of a common law assumpsit, as defendant in error seemed to think until the rulings of the court landed him into a simple action on the warranty of the goods, and the machines had been paid for in money instead of property, then there might be some law for the rule of damages adopted by the court.

But the true rule of damages applicable to the case is stated by Mr. Sedgwick as follows:

"It seems originally to have been held, that the measure of damages in these cases was the difference between the price paid and the actual value; but it is now well settled, that the rule is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty, the price paid being mere evidence of that value."

Sedw. Dam., (6th Ed., Mar.,) pp. 287 to 291.
Field on Dam., secs. 281 to 285 inclusive.
Eggleston on Dam., sec. 530.
Wood's Mayne, on Dam., sec. 224.
Benjamin vs. Hilliard, 23, How., 167.

Birdsell vs. Carter, 11 Neb., 143.
Holmes vs. Boydston, 1 Neb., 346.
Callanan vs. Brown & Co., 31 Iowa, 340.
Cary vs. Gruman, 4 Hill (N. Y.) 625.
Muller vs. Eno, 14 N. Y., 606.
Woodward vs. Thacker 21. Vt., 580.
Houghton vs. Carpenter, 40 Vt., 588.
Marshall vs. Wood, 16 Ala. 806.
Slaughter vs. Rae, 3 La., 455.
Morton vs. Thompson, 4 Grat., 455.
Fish vs. Hicks, 31 N. H., 535.
Clare vs. Manard, 7 Car. and Payne, 741.

For the stronger reason that as to the machines in controversy (although it is different from the store property which was paid for in money and clearly separable and actually separated in the action below by defendant in error,) it was no sale but a mere barter—an exchange of lands for reapers—where prices were but terms of convenience in effecting the exchange; the value of the thing instead of such price is the true ground from which to measure the damage. Paying in trade is very different from paying in cash.

Devin vs. Himer, 29 Iowa, 297.
Mitchell vs. Gile, 12 N. H., 392.
Chaplin vs. Warner, 23 Wis., 448.

The injustice of the rule adopted by the court below, that the measure of damages is the difference between the defective machines as they actually were in their impaired condition and the price at which they were taken in the trade, is well illustrated in this case. Suppose, which is believed to be true, that the property of both sides was taken in the trade at over double cash value; that each machine perfect would be worth in cash $85; that each one was just a little defective below the standard of the warranty so that its actual value would be $84. Then take the rule of the court below and from the contract price, $175, subtract the value as the machine then actually was, $84, and the difference, $91, would be the damage on each machine, enough to repair the machine and buy another

one like it and have some spending money besides. Here the injustice of the rule falls wholly on plaintiffs in error. Now on the other hand, suppose that defendant in error made a good trade, and that although he took the machines at $175 each, they were actually worth $250 each, then under the rule of the court below, he could get no damage on any machine for a breach of the warranty unless the value was depreciated by the defects at least $75. Here he would be wholly deprived of his good bargain and the injustice of the rule would wholly fall on him. The reason for the true rule as above given is, "That the parties should not be deprived of the benefits of a good bargain."

Field on Dam., sec. 285.

3 Par., Cont. (6th Ed.) *p. 211.

THE SURROUNDING CIRCUMSTANCES.

For the purpose of construing the written contract in its bearing on both causes of action, sued on in the court below, the court should have been put into the circumstances at the time surrounding the contracting parties, and erred in excluding the evidence offered for that purpose by plaintiff in error.

Hinneman vs. Rosenback, 39 N. Y., 98.

Nash vs. Towne, 5 Wall., 689.

This is so in this case, not only because of the peculiarities of the writings themselves, but because: "The general rule that unambiguous languague in a contract does not exclude extrinsic evidence of the subject matter and other surrounding circumstances to enable the court to consider what the parties saw and knew in order to ascertain their meaning."

Abb., Trial Ev., p. 509 and cases cited.

THE AFFIRMATIVE DEFENSES.

Proof that plaintiffs in error made good the warranty should have been admitted as a defense on several grounds. It will be observed that the writing does not stop with warranty but proceeds to tell what the warrantor should do, but does not say they shall pay damages. It simply says they shall "stand good." They being manufacturers of the articles, it is a fair construction to say that, in the light of surrounding circum-

stances, the writing, if it did not leave the manner of standing good entirely unprovided for, meant to stand good by supplying deficiencies. Hinneman vs. Rosenback, 39 N. Y., 98. Of fraudulent representations in Pulsford vs. Richards, 17, Beavan, 95, it is held that "if the representation made be one which can be made good, the party to the contract shall be compelled or may be at liberty to do so." This liberty should be granted to a mere warrantor, who is guilty of no fraud from the simple reason of a breach of the warranty. Loupe vs. Wood, 51 Cal., 586. In Benjamin vs. Hilliard, 23 How., 167, the court in suit on guaranty, or as the court on page 166 calls it a "warranty," say "it was proper for the plaintiff to notify the principals and their surety of the defects in their work and to call on them to amend it."

The parol agreement by the parties fixing how plaintiffs in error should "stand good," so often repeated as pleaded in the answer was competent to be proved for several reasons.

It did not contradict or vary the writing but was an independent collateral contract on a point not covered by the writing and was therefore competent to be made at the time, without being afterwards repeated as it was.

Abbotts Trial Evidence, p. 295.

2 Whar. Ev., sec. 931, note 1, secs. 1020, no. 4, 1044 and 1060. Shepard vs. Hoos., 14, Kan. 443. Hope vs. Bolen, 58 N. Y., 380. Himeman vs. Rosenback, 39 N. Y., 98.

It was upon a good consideration. It was an advantage to both parties. Says Marshall, C. J., in Violet vs. Patton, 5 Cranch, 150: "It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction." In Bayleyville vs. Lowell, 20 Me., 182, the court says, "He deemed the measure an advantage to him, equivalent to the sacrifice and he best knew what his interests required. The course thus pursued was a trouble to them, which amounts to a legal consideration; and it is not the less so, because their interests were not also promoted by that mode of extinguishing their debt. If both parties were benefitted, so much the better." It benefitted plaintiff in error, by giving them more time (The Delaware, 14 Wall., 603,) and enabled them to work out in their own line of business a certain

amount instead of paying money. (1 Addison Cont., 376. 6 Cranch, 264.) It was an advantage to defendant in error because it would not be likely that he could obtain the same machines and repairs to make the warranty good from any other factory without paying more than the same were worth, besides he was saved the trouble of making the attempt. It was the same to him as an independent order on a reaper manufactory for such deficiencies, and is founded on precisely as good a consideration. The indebtedness between them could make no sort of difference, nor is there any difference in paying money or releasing of debt so far as the sufficiency of the consideration is concerned, when it is chattels and labor contracted for. Besides the extension of time for supplying deficiencies gave the parties respectively the advantages and disadvantages of the fluctuations in the values of the labor and things in the meantime. (Mitchell vs. Gile, 12 N. H., 392.) The providing for an uncertain and unliquidated claim for damages itself makes a good consideration. If the services and expenditures of plaintiffs in error in making the goods what they were warranted to be, was equivalent to paying the damages in money, then the plaintiffs in error had the right to do so without any parol agreement to that effect; and if they were not so equivalent to paying in money, then the agreement to do so was supported by a good consideration, for the non-performance of which a separate action would lie.

When the parol contract was ratified and agreed to after the writings of November 5th, 1877, the writings were fully executed and the new agreement was a substitution for the liability on the warranty, and was of itself without performance (being founded on a good consideration and expressly agreed to be a satisfaction) a full and complete accord and satisfaction of the liability on the warranty.

Peck vs. Davis, 19 Pick., 490.
Sterns vs. Hill, 9 Cush., 31 and 34.
Cartwright vs. Cook, 3 Barn., and Adoph. 701.
Canal Co. vs. Ray, 101 U. S., 527.
Sheehy vs. Mandeville, 6 Cranch, 264.
Merry vs. Allen, 39 Iowa, 235.
Hall vs. Smith, 15 Iowa, 584.

Hall vs. Smith, 10 Iowa, 45.
Montgomery vs. Allen, 13 Ga., 406.
Billings vs. Bondeback, 23 Barb., 546.
Blackburn vs. Ormsby, 41 Pa. St., 97.
Goodrick vs. Stanley, 24 Conn., 613.
Mansfield vs. Cotton, 21 Texas, 1.

In Sheehy vs. Mandeville, Chief Justice Marshall thus states the principle: "This appears to be well settled. The note of one of the parties, or of a third party may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case, for a man may, if such be his will, discharge his debtor without any consideration." Again in the same place he lays down a principle which exactly plumps this case: "Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and being admitted, it bars the action for the goods." But in the case more like the one at bar of Cartwright vs. Cook, the court says: "The promise of one was a consideration for that of the other. Each had an immediate remedy upon it against the other, and in this respect it falls within the rule in Com. Dig. Accord, B. 4, that an accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance."

But in this case plaintiffs in error did, as they plead, not only enter into the agreement which of itself was made a satisfaction, but went further and actually performed the same.

But if the agreement had not provided that it was "agreed to between the parties hereto as satisfactory, and making good the warranty of defendants (below) in said agreement dated November 5th, 1877," nor without such express provisinns, showed that such was the intention, still the tender of performance was admissible in evidence as a defense. Benner vs. Piper, 25 Iowa, 402. In this case Judge Dillon discusses this point and also the mode of pleading, all to the satisfaction of plaintiffs in error and in justification of the way they plead below. To this decision and the authorities cited, the attention of the court is specially invited.

There is no claim in the reply that defendant repudiated before the satisfaction, and thereby ended it, and this not being done the plaintiffs in error as fair dealing men were not only justified in going ahead with the performance, but were bound to do so; and after doing so defendant ought to be estopped from claiming money in damages to cover the very value bestowed on the property by the labor and outlays of plantiffs in error. As soon as such outlays and labor were commenced the same principle of estoppel bears against defendant in error. "When a person tacitly encourages an act to be done he cannot afterwards exercise his legal rights in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim." Swaim vs. Seamens, 9 Wall., 254. Taking the answer, which for the purpose of this case must be taken as true, the plaintiffs in error in good faith under agreement with defendant in error went on and spent money and labor on the property of defendant in error and made good their warranty, still the beneficiary of such services gets double pay—by the rulings below—once in services and property, and once in money.

The commencement of the suit could have no effect on the accord and satisfaction which could have taken place, before, after, or at that very time. It might have been that it was originally started to hurry up the performance, which was the natural effect of it. At all events, there was nothing in the record on the part of defendant in error tending to show any objection to performance until the same was a past fact and actually complete.

As to the second cause of action—the one for freights—the amendment to the answer also pleads an affirmative defense by parol agreement. To this, the above discussion of parol agreements, applies with full force. We submit that, without the agreement the writings themselves contemplate future precedent acts to be done previous to any liability. That a future accounting should be had after all the several liabilities and cross-liabilities could be ascertained, and that these things should have been averred. It was certainly competent for the parties to make an express agreement to that effect, fixing the time allowed to do the contemplated precedent acts. It is contended that on this the petition does not state sufficient facts to be

a cause of action. That if it does, the answer states new matter showing that the action was prematurely brought.

Another ground of affirmative defense is the deceit in the sale of the cigars. The court below should have admitted proof of the averments of the answer on this subject and have left it to the jury to say whether there was a sale by sample and an implied warranty accordingly. Enough is pleaded to show that.

Williams vs. Manly, 13 Mass., 138.

Getty vs. Roundtree, 2 Chand., (Wis.) 386.

Bishop on Contracts, sec. 97.

"Implied warrantees do not rest on any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to fraud. It is for the sake of convenience, merely, that this obligation is permitted to be enforced under the form of a contract. However refined this distinction may appear, its nonobservance has lead to much of the confusion to be found in the cases on this subject,"

Hoe vs. Sanborn, 21 N. Y., 564, Selden, J.

POINT ON ATTACHMENT.

The Nebraska code, so far as deemed useful to this case, is as follows:

Sec. 198. "The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: First, when the defendant or one of several defendants is a foreign corporation or non-resident of this state; or second, has absconded with intent to defraud his creditors; or third, has left the county of his residence to avoid the service of a summons; or fourth, so conceals himself that a summons cannot be served upon him; or fifth, is about to remove his property or a part thereof, out of the jurisdiction of the court with intent to defraud his creditors; or sixth, is about to convert his property or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or seventh, has property or rights in action, which it conceals; or eighth, has assigned, removed or disposed of, or is about to dispose of, his property, or a part thereof, with intent to defraud his creditors; or ninth

fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought."

Compiled Statutes, p. 555.

This is construed to confine all attachments to actions *ex contractu.*

Handy vs. Brong, 4 Neb., 60.

Sec. 200. "When the ground of attachment is, that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking. In all other cases the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiffs claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained." C. S., p. 556.

Sec. 212. An order of attachment binds the property attached from the time of service." C. S., p. 557.

The first part of the above section, 200, to-wit: "When the ground of the attachment is, that the defendant is a foreign corporation or a non-resident of the state, the order of attachment may be issued without an undertaking," can not stand against citizens of other states in the face of Sec. 2, Art. 4, U. S. constitution, which says, "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." They clash with each other, and the state statute falls as unconstitutional and void.

Paul vs. Virginia, 8 Wall., 180,
Ward vs. Maryland, 12 Wall., 430,
Slaughter House cases, 16 Wall., 118 and 77.
Williams vs. Bruffy, 6 U. S., (Otto) 183.
Strauder vs. West Va., 100 U. S., (Otto) 303.
Railroad Co. vs. Richmond, 96 U. S., (Otto) 529.
Chemung, C. B. vs. Lowery, 93 U. S., (Otto) 77.

These cases are specially cited because of this clause ofthe constitution they say: In Paul vs. Virginia, that this clause of the U. S. constitution "inhibits discriminating legislation against" citizens of other states and in-

sures to them "the enjoyment of property and in the pursuit of happiness and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this:" In Ward vs. Maryland, "beyond doubt these words are words of very comprehensive meaning." In the Slaughter House cases, "that whatever those rights, as you grant or establish them to your own citizens or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states without your jurisdiction," and that "equality before the law is undoubtedly one of the privileges and immunities of every citizen." In Williams vs. Bruffy, "this provision has been held in repeated adjudications of this court, to prohibit discriminating legislation by one state against citizens of another state, and to secure to them the equal protection of its laws, and the same freedom possessed by its own citizens in the acquisition and enjoyment of property." In Strauder vs. West Virginia, in speaking of what is "equal protection of the laws," although discussing another provision, "that the state of West Virginia discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws." In Railroad Co. vs. Richmond, "all laws should be general in their operation." In Chemung Canal Bank vs. Lowery, "there is in fact a valid reason for the discrimination." This case holds in effect that there must in all cases of discrimination be found a good and valid reason therefor or the statute must fall. The majority of the court in the case found a reason satisfactory to them, but not so to one of their number. That reason, however, does not apply here.

No objection is urged against the discrimination in the above quoted section, 198, of Nebraska statutes, allowing attachments on the ground of non-residency, irrespective of whether defendant is doing or has done anything fraudulent, because there seems to be a reason therefor. That may be necessary to acquire jurisdiction of the property. Furthermore, non-residents are too far away from plaintiff for him to know the ordinary grounds for attachment, or removing or selling property to defraud, &c. Their persons being beyond the jurisdiction, that fact may be used as a substitute

for the personal acts that constitute a cause of attachment. But still he is as much entitled to the indemnity bond, when the attachment is sued out, because he is a non-resident, as when it is because he is charged with perpetrating a fraud. One charged with a fraud can have no stronger claim for security of property simply because he lives in the state, than a citizen of another state who is guilty of nothing except living in a different state. As to the indemnity undertaking, there is no reason for a difference on the simple ground of residency. It is competent for the state to make a difference as to residents and non-residents, but such difference must be just and reasonable and grounded in the very circumstances of the differences of the places of residence, and based on the police powers of the state. Such differences on account of residence as are permitted and as are prohibited, are well illustrated by the above statutes of Nebraska. An instance of the former is making non-residency a ground of attachment. An instance of the latter is making non-residency the sole reason for withholding the privileges of the bond of indemnity against loss, and the sole reason for withholding immunity from irresponsible seizures—in other words, non-residency is the sole reason why there shall be no right to enjoy property like others, and in many instances no right to own it or have it protected from utter destruction or loss. It can not be denied that black-mailing non-residents is the very frequent use to which this clause of the statute is put, and this too may be in the presence of non-residents who are traveling through the state and may be personally served, but whose circumstances and situation render them easy preys to the black-mailer.

The sole purpose of an attachment in Nebraska, evidently is to secure a lien on property in advance of judgment and to hold it for the satisfaction of whatever claim may be established against the owner. This purpose is completely accomplished by the seizure. The authority for the seizure is solely the ground of the attachment. This is covered completely by sec. 198 of Nebraska code. Section 200 on undertakings is not necessary to the seizure. It might be altogether omitted so far as the efficacy of the attachment is concerned. It is made for altogether a different purpose. Sec. 198 is wholly in the interest of the plaintiff. Sec. 200 is

wholly in the interest of the defendant. If the first part of sec. 200 is good, why not replevy property of non-residents without bond, and obtain injunctions against them without bond, and put their property into hands of receivers without bond? It is just that indemnity should be given in all cases where property is seized against the will of the owner before there has been a day in court, due process of law or debt established. It is right that there be a guaranty against injustice while depriving a person of the use, control or enjoyment (the most valuable attributes) of property, until due process of law can be had. This is the principle upon which the undertaking is guaranteed to the resident. Is it not one of substance, and does it not apply as well to citizens of other states? After the seizure is made, the partiality and injustice is completely done. It is then no atonement to impartially provide that all alike may obtain a release of their property by giving a delivery bond. One place where the statute making an unjust discrimination is not cured by another on a different subject making no discrimination. Besides this, still the resident is secure without a delivery bond, and can safely rely on such security, while the attaching party is charged with all affirmative acts and the burden of establishing all he claims. The non-resident is without security and is made to rest, as it were, with the presumptions against him, and compelled to move affirmatively to save his property, which he can only do when financially able, and usually by depositing cash with a resident to the amount of the value of the property taken. He is thus made to keep one dollar idle standing guard over another, and has the enjoyment of only one half his property.

If such a statute is necessary to a state, in order to protect itself against non-residents, it is strange how almost all the other states of this union have flourished so long without it.

Besides Nebraska, Ohio and Kansas are believed to be the only states having it, and the Nebraska court, only 131 having discussed it. The supreme court of Nebraska has held it good in two cases.

The case of Marsh vs Steele, 9 Neb., 102, places the decision on this ground: "This provision was not intended to prohibit distinctions founded on residence." The case of Olmstead vs. Rivers, 9 Neb., 235, is

placed on the same ground, with the additional ground that the United States constitution "does not embrace privileges conferred by the local laws of a state." Both cases content themselves without attempting any reason for the discrimination. To support the first ground of the opinion in Olmstead vs. Rivers, the court cites Connor vs. Elliott, 18 How., 591, as authority that the clause of the Federal constitution under discussion does not embrace the privileges conferred by the local laws of the state. But that decision is upon this ground: "The law does not discriminate between citizens of the state and other persons; it discriminates between contracts—only. Such discrimination has no connection with the clause of the constitution now in question." Curtis, J., p. 594. The second ground in 9th Neb. 235, goes plump against the strong reasonings of Mr. Justice Miller in the Slaughter House cases, showing that the constitution is broad enough to cover all future growth of the rights of all citizens, whether by virtue of general law or state law, reaching the latter even though it be called "local law." The reading of these opinions in 9 Neb. begets the feeling, not so much that the decisions flow from foundation reasons, as that the decisions were first made and the struggle for the reasons took place afterwards.

It will not do to meet this question by the assertion that "non-residency" and "citizenship" are not synonymous terms, and that therefore the Nebraska statute does not clash with the Federal constitution.

Such an answer is founded on a technicality—a legal fiction invented by some courts to meet certain contingencies arising from the peculiar phraseology of state practice acts.

But the reasons for these distinctions do not apply in the question at bar at all, and are not mentioned in any of the cases or text books in connection with the discussion of the constitutional point in issue; but on the contrary, in all such discussions, the terms "residence," and "citizenship," are used indiscriminately.

In the case or Ward vs. Maryland, 12 Wall, 418, Mr. Evarts, for plaintiff in error, assailed a statute of Maryland, which used the terms "*resident*" and "*non resident*," like ours, (and not the term citizen) as repugnant to sec. 2, art. 4, U. S. constitution. No counselor on either side,

nor judge on the bench, ever thought of basing an argument on such a play on or quibble over the word resident and citizen. The court held the law bad as obnoxious to that clause of the U. S. constitution. The court say: "Reasonable regulations for the collection of such taxes may be passed by the States, whether the property taxed belongs to residents or non-residents." But they further say: "The court is unhesitatingly of opinion that the statute in question is repugnant to the second section of the fourth article of the constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states." This Maryland statute also covered aliens as well as citizens of other states, and aliens are not protected by U. S. constitution.

In the late case of Williams vs. Bruffy, 6 U. S. (Otto) 176, a statute of Virginia, which uses the term "alien enemy" instead of either "resident" or "citizen" of another state, was held void as obnoxious to that same clause of the federal constitution. Others of the cases cited above on p. 28 are also useful in this connection.

Says Marshall, C. J., in Gassies vs. Ballon, 6 Pet., 761: "A citizen of the United States, residing in any State of the Union, is a citizen of that State."

In the constitution the terms "citizen" and "alien" are used to include all inhabitants, and all who are not aliens are citizens, and prima facia, all inhabitants are citizens.

State vs. Beakmo, 6 Blackf. (Ind.) 488.

Dred Scott vs. Sanford, 19 How. 393, 404.

Ward vs. Morris, 4 Har. & M. (Md.) 314.

Assume for the sake of argument that if the statute in question had used the word citizen instead of resident, it would be bad, and that there is such a distinction between the words residents and citizens, while we look at this point. The statute as it reads covers all the citizens of all the other states except citizens of Nebraska who are non residents of Nebraska. How many are they? One hundred may number them all. Then the statute applies to fifty millions of the citizens of other states and one hundred of our own citizens, and there are five hundred thousand of our own citizens

that it does not apply to. Substantially all our citizens would come under one rule, and substantially all citizens of other states would come under the very extremely rare exception to that rule, an exception in the ratio of one to five thousand.

Now take the proportion of the citizens of other states who get the benefit of the citizens of this state, and the contrast is still greater. Say one hundred citizens of other states, residents of this, and fifty millions, citizens of other states, non-residents of this, the ratio is one to four hundred thousand. These figures look like a burlesque when used as an argument to show there is no discrimination against citizens of other states, within the meaning of the U. S. constitution. "In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect."

Miller, J., in Henderson vs. Meyer, 92 U. S., 259.

But, *prima facia*, there are no exceptions as above estimated, and on the face of the statute and record until the exception is proved in the particular case in litigation, all courts must say with Chief Justice Marshall: "Citizens are citizens of the state in which they reside."

Gassies vs. Ballon, 6 Pet. 761.

State vs. Beakmo, 6 Blackf. (Ind.) 488.

Bou. Dict. "Citizen."

Story on Const., sec. 1687.

The Pizarro, 2nd Wheat. 246.

In the case at bar the record does expressly and affirmatively show that the plaintiffs in error are citizens of the state of Pennsylvania. Therefore they are citizens of the United States. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they *reside*."

14th Amed. U. S. Const.

The wrongful attachment of property by an irresponsible plaintiff is very often a practical confiscation of defendant's property, if there be no indemnity undertaking; and in all such cases there is at least partially a practical confiscation. What better thing can this clause of the constitu-

tion mean than to prevent such consequences? I leave this subject with these propositions:

1. The state statute makes a substantial and injurious discrimination against citizens of the several states.

2. There must be some good reason, flowing from the police power of the state, for this discrimination, or it is unconstitutional and void.

3. There is no such reason.

J. H. BROADY,
Of Counsel for Plaintiffs in Error.

Supreme Court of the U. S.

JAMES S. MARSH and E. C. MARSH,
Pl'ffs in Error,

vs.

JOHN MCPHERSON,
Def't in Error.

No. 282.

Reply to Brief of Defendant in Error.

1. Concerning the attachment question it is desired to say in reply to the last sentence of defendant's remarks on that subject, this; To hold this attachment bad cannot in the least disturb titles, because it would not follow, that all such past attachments were absolutely void so that they could be attached collaterally, but that they were merely erroneous, and could have been avoided if they had been contested at the proper time in the same action and by appellate proceedings.

2. On the measure of damages, some of the cases cited by defendant are in actions for the money paid on rescissions of contract, and others are cases of covenants of warranty of title to land. These cases of course are not applicable to the case at bar. The other cases, if any

which are applicable, serve to show the slight conflict of authority on this subject.

3. The whole action being on warranty of goods (so the instructions asked for by both sides show) the rule is the same both as to defective and missing machines.

4. Now, as to defendant's point as to error without prejudice. It is a far-fetched stretch of imagination to to say that if the case had been tried on a different theory, (that is as an action of rescission of the contract and for the consideration back instead of an action on the contract and damages for its breach,) plaintiffs in error would have fared worse. That is not the way to ascertain whether there was prejudice. What error without prejudice means, is whether it appears on the record that the ruling could not prejudice the party on the theory on which the case is tried. No one below objected to the holding of the court below that it was an action purely on warranty. On the contrary, both sides asked instructions on that theory. If the defendant in error wished to review that discussion below, he should have excepted at the time and himself obtained a writ of error to review the judgment, and to obtain trial on his own theory. His point now is to get the expected fruit to himself of a trial on such a theory of the action, but at the same time deny us a trial on that theory.

But he cannot say anything about error without prejudice in this cause, because the record does not show affimatively that there was no prejudice which must so appear before such a point can be made.

Smith vs. Shoemaker, 17 Wall, 630.
Deery vs. Croy, 5 Wall, 796.

However, inasmuch as an intimation may be sought for the benefit of a future trial, I will say that the court below was correct in holding that the property passed at the date of the writing of November 5, 1877, and that the action was one simply on warranty of chattels. To rescind he would first have to return or offer to return what he received. 2 Wharton on Ev., § 932, 934, 1017 and 1019. This contract says the chattels had been delivered and they signed it on both sides, and the reply of defendants in error, alleges this same contract to be the final and last agreement. This settles the question of the passing of the title to the goods. As between the parties the title passed without delivery, but this agreement also settles the question of delivery.

Leonard vs. Davis, 1 Black, 476.
Tome vs. Dulvis, 6 Wall; 553.
1 Par. Cont, 519, 529 and 531.
Hill. on Sales, p. 120, Sec. 11, and p. 2.
Swartz vs. Chappel, 19 Wis, 304.
Johnson vs. Sharp, 316, O. S. 611.

The answer does put in issue all the allegations of the petitions outside the writings. It only admits the written contracts, and then denies all the allegations of the petition not so expressly admitted in the answer.

5. As to the Bill of exceptions, the practice is under the State Code, and that is authorized by U. S. Statutes, and the proceedings were according to both.

Neb. Laws, 1877, pp. 11 and 12
Rev. Stat. U. S.(1875) p. 173, Sec. 914.
Desty's Fed. Pro. Sec. 914.

It is not believed that the 40 days was beyond the term of the trial court. There is nothing in the record

to show it, and hence, for the purpose of this case, it is impossible for this court to know it, neither does it make any difference if it was so. If they wished to object, then was the time to do so, when the order was made and not here in this court for the first time. Moreover they waived any such objection by helping to make the bill of exceptions, and correcting it to suit them as the record shows. Furthermore, even in this court the point should have been made by motion before entering on the discussion of the merits of the case. For the defendant to discuss the merits of the controversy presented by the bill of exceptions, and the afterwards deny the existence of the same bill of exceptions, looks a little awkward to say the least.

J. H. BROADY,
Counsel for Pl'ffs in Error.

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FEB 18 1896

In Supreme Court of the United States.

JAMES MARSH and E. C. MARSH.
PLAINTIFFS IN ERROR,
vs.
JOHN McPHERSON,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

The Attachment Law not unconstitutional. The statutes of Nebraska, under which the attachment were issued, are as follows:

Sec. 198 of Compiled Statutes, p. 555: "The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: *First.* When the defendant, or one of sev-

eral defendants, is a foreign corporation, or a non-resident of this state;" * * *

Sec. 199. "An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in this office an affidavit of the plaintiff, his agent, or attorney, showing: *First.* The nature of the plaintiff's claim. *Second.* That it is just. *Third.* The amount which the affiant believes the plaintiff ought to recover. *Fourth.* The existence of some one of the grounds for an attachment enumerated in the preceding section.

Sec. 200. "When the ground of the attachment is that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking. In all other cases, the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained."

In the case at bar, the affidavit for attachment sets forth as a ground for the attachment, that the defendants were non-residents of Nebraska. No attachment undertaking was given. It is urged by plaintiffs in error that the provision of sec. 200, above quoted, providing that in such cases no undertaking is necessary, is in conflict with

the first clause of sec. 2. of article IV of Federal Constitution.

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The right of a defendant to demand that the plaintiff in attachment shall give an attachment bond is not a privilege or immunity of citizenship. The privileges and immunities protected by the constitution are those "which are *fundamental*; which belong of right to the citizens of all free governments and which have at all times been enjoyed by citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. Corfield *vs.* Coryell. 4 Wash. C. C., 380. Slaughter House Cases, 16 Wall., 76.

Can it be said to be a *fundamental* right of a defendant in an attachment suit to demand a bond of the plaintiff? It is not a right at all, but it is simply a duty established by the laws of the State upon the plaintiff to give an undertaking in certain cases before the writ of attachment shall issue. It is an obligation resting upon the plaintiff, whether he be a citizen or non-resident alike, that he shall not have this writ until an undertaking is filed. It is not, therefore, a fundamental right, a privilege or immunity, which the defendant can enjoy or demand, but a statutory obligation rather, and resting upon the plaintiff.

This section of the constitution does not confer on the citizens of each State all the privileges and immunities which the several States enjoy. "Such is not its language

or import. No court or Legislature has ever given such a construction to it, but, on the contrary, a marked distinction has ever been made by them between the rights and powers of citizens *of a State* and the rights and powers of all other persons." * * * "To deny the right to every State to make such distinction would be to annihilate the sovereignty of the States." State *vs.* Medbury, 3 R. I., 141.

The privileges and immunities of citizens, within the meaning of the constitution, are those of so fundamental a character that they necessarily attach and belong to a citizen of the United States, but not such special privileges and immunities as any one State may grant to its own citizens. It will not be said that a citizen of Iowa may enjoy any and every privilege within the State of Nebraska, that Nebraska may grant to its own citizens, but rather that a citizen of Iowa may enjoy within Nebraska only those fundamental privileges and immunities that belong to him as a citizen of the United States, and subject to such regulations as the common good may require. McCready *vs.* Virginia, 4 Otto, 395–6.

"Special privileges enjoyed by citizens in their own States are not secured in other States by this provision." Paul *vs.* Virginia, 8 Wall., 180.

This court has held that the right to practice law is not one of the fundamental privileges, or immunities, (Bradwell *vs.* State, 16 Wall., 130); likewise of the right to sell liquor, (Bartemeyer *vs.* Iowa, 18 Wall., 129), and the

right to the exercise of the elective franchise, (Miner *vs.* Hoppersett, 21 Wall., 162), and the right of trial by a jury in suits at common law in State courts. To say of a defendant, that he has such a "fundamental right" to demand of a plaintiff in an attachment suit that a bond shall be given, "as belongs of right to the citizens of all free governments and which has, at all times, been enjoyed by the citizens of the several States," is a proposition that refutes itself.

Non-resident. The feature of the attachment law under discussion is not based on citizenship but upon residence. Non-residence is made the ground of attachment. It is when the attachment is against a non-resident that no bond is required.

This constitutional provision has nothing to do with the distinctions founded on residence. Pass. Ann. Con. P., 225. Lemmon *vs.* People, 20. N. Y., 608.

The illustrations of these distinctions are numerous. A license may be required to sell foreign articles when those of domestic manufacture are sold without license. License Cases, 5 How., 504.

Insurance agents of foreign companies may be compelled to pay a tax or license to carry on such business while the agents of home companies be not taxed. People *vs.* Thurber, 13 Ill., 554.

In time of pestilence the ports of a State may be closed

against the citizens of other States. It is the law of nature—self-preservation.

A State may prohibit citizens of other States from taking fish or oysters from its navigable waters. State *vs.* Medbury, 3. R. I., 141.

A citizen of any State cannot vote in Nebraska because he is a citizen of any other State, but he must first become a citizen of our State and comply with our laws.

A citizen of one State may have a certain amount of property exempt from liability for his debts, while all the property of a non-resident may be taken from him by execution. An attachment can issue against a non-resident simply because he is a non-resident. Cooley Con. Lim., 307. Campbell *vs.* Morris, 3 H. and McH., 554.

Each and all of these illustrations are more nearly a violation of this constitutional proviso than the want of an undertaking in an attachment against a non-resident.

This question of attachment does not depend upon *citizenship* but upon *non-residence*. Citizenship and residence are not synonomous. A citizen of a State retains his citizenship until he has become a citizen of some other State; but a resident or inhabitant who leaves a State, intending not to return, has lost his residence and become a non-resident whether he has established a citizenship elsewhere or not. A man may be domiciled or a *citizen in a State* and nevertheless be a *non-resident* within the attachment law. Drake on Attachment, secs., 63, 64, 65.

Haggart *vs.* Morgan, 1 Selden, 422. Frost *vs.* Brisbin, 19 Wend., 11. Risewick *vs.* Davis, 19 Maryland, 82.

We attached the defendants' property, not on the charge that they are citizens of Pennsylvania, but on the ground that they are non-residents of Nebraska.

In Haggart *vs.* Morgan the defendant was a citizen of New York, and had been absent about three years attending a law-suit in New Orleans, and returned in Spring of 1848. In 1847 his property had been attached, on the ground that he was a non-resident. The court held that there was a distinction between citizenship, or *domicile*, and *residence*; that the citizen might have his residence abroad within the spirit of the statute, which was intended to give a remedy to creditors whose debtors could not be served with process, while his domicile continued in the State. "He (Morgan) was therefore a non-resident when the attachment was issued * * although *domiciled* in New York."

In Frost vs Brisbin a similar question arose, and it was held that actual *residence*, without regard to the *domicile* of the defendant, was within the contemplation of the statute.

"The *domicile* of a citizen may be in one State or Territory, and his actual residence in another."

Conceding, however, for the purpose of the argument, that "non-resident," and "citizen of another State," mean

the same thing, or more particularly, that the statute read *a citizen of another State*, instead of using the word *non-resident*, still it would not be obnoxious to Sec. 2, Art. 4 of the Constitution. The privilege, or immunity, if it can be called such, granted under the provision of the attachment law in controversy, is simply that the plaintiff may have an attachment against a non-resident, without giving an undertaking. This same privilege, or immunity, is granted *to citizens of the several States* who may sue in our Courts. The provision of the statute is not that a citizen of Nebraska may sue, by attachment, against a non-resident, without giving an undertaking, but it permits any person, be he a citizen of any State, to sue out his attachment against a non-resident of Nebraska, without giving an undertaking.

In the case of Frost vs. Brisbin, 19 Wend., 11, it was urged that a law of New York, which provided that no person should be arrested on civil process, except in cases where the defendant "shall not have been a *resident* of this State for at least one month previous to the commencement of a suit against him," was in violation of this same Article of the Constitution of the United States.

Nelson, C. J., says, in the opinion of the Court, "this, obviously, is an erroneous view of the Constitution. Our own citizens must be *residents* for the month to be entitled to exemption under the statute. The privilege from arrest does not depend upon *citizenship* or *domicile*, any further than they may include *residence*, but upon *residence* such as we have endeavored to explain.

"The idea of the statute was, to limit the privilege to debtors living permanently in the State for the time being, which, it was presumed, would generally bring their property within the reach of execution: or enable the creditor to apply any other coercive measure, in the collection of his debt, which the laws have provided.

"All our construction of the statutes exacts, in respect to the citizens of other States and Territories, is that they shall put themselves on a footing with our own citizens, and then they are entitled to the like immunities.

"Surely this clause of the Constitution enjoins nothing further. The argument goes the unreasonable length of claiming for citizens of other States, privileges surpassing our own."

In People *vs.* Coleman, 4 Cal., 46, a quite similar question arose. Under the Revenue Act of 1853, of California, a special license was imposed upon all persons selling merchandise brought within the State from other States, for sale and owned by persons domiciled in other States, and it was urged that this law was in violation of the privileges and immunities guaranteed to citizens of the several States, in that it operated as an extraordinary tax on non-residents, but the Court held the point not well taken, and sustained the law.

Under the law of Louisiana, a marriage contracted in that State, or where, after marriage, the parties came there to live, gave the parties certain property interests. It was insisted, as this law gave what might be termed a Louisiana widow the right of marital community, and denied the same right to all widows, citizens of the sev-

eral States, that the law was obnoxious to this Constitutional objection, but the Supreme Court of the United States held otherwise. Conner, et al. *vs.* Elliott, et al., 18 Howard, 591.

In McCready *vs.* Virginia, 4 Otto, 391, was presented to the Supreme Court the question whether a law of Virginia, which granted to citizens of that State, the right of planting oysters in the rivers of that State, where the tide ebbs and flows, and excluded citizens of the other States from the same privilege, was obnoxious to this Constitutional objection. Waite, C. J., says in opinion: "No one would venture to contend that the citizens of other States had a Constitutional right to the enjoyment of this privilege of Virginia citizenship, * * it is not a *privilege* or *immunity* of general, but of special citizenship. * * it does not, of right, belong to the citizens of all free governments."

Many other cases might be cited, to show that not every mere incident that a State has enacted for its own protection, has been deemed one of the *fundamental rights*, protected by the Constitution.

States have a right to protect themselves and their people. All agree that non-residence is a proper cause for attachment. There is no argument that can be urged, tending to show the unconstitutionality of the proviso that does not require the undertaking, but what can be urged with *equal force* against non-residence as a ground of attachment.

It is not a *fundamental* right, privilege, or immunity of any citizen, to hold his property free from attachment by

his creditors, or to demand an undertaking when it is attached. These are the mere incidents of practice which each State adopts for itself. Walker *vs.* Sauvinet, 2 Otto, 90. Kincaid *vs.* Francis, Cooke, 49.

We acquire jurisdiction of the property of non-residents by attachment, and if this Court should say we cannot acquire that jurisdiction unless the plaintiff will give a bond in double the amount of his claim, it puts up a barrier that would destroy all the efficacy of the law.

The same reasoning that will support non-residence as a ground of attachment, will support the proviso that does not require a bond in such case.

This same proviso as to attachment exists in Ohio, Kansas, Wyoming, and, possibly, elsewhere. It has been recognized by the Courts as a valid law for nearly a quarter of a century. Titles to property, both real and personal, have been acquired under it, and to now subvert the law, would be to lead to unspeakable injuries, and accomplish no good. If there ever was a case where a Court should pause and meditate before declaring a law unconstitutional, it is here presented.

The Measure of damages for such machines as were not delivered, was correctly stated in the charge of the Court as being the contract price—as shown by the contract, the consideration having been paid. Nash *vs.* Towne, 5 Wall., 689. Wilkinson *vs.* Ferree, 24 Pa. St., 540. Mahar *vs.* Riley, 17 Cal., 415. Bush *vs.* Canfield, 2 Conn., 485. Frazier *vs.* Supervisors of Peoria Co., 74 Ill., 282. Sawyer *vs.* Warner, 36 Iowa, 333. Arthur

vs. Moss, 1 Oregon, 193. Patrick *vs.* Leach, 1 McCrary, 250.

Measure of damages for defective machines. The measure of damages as to such of the machines as were defective and not as warranted, under the facts and circumstances of this case was the difference between their value in their defective condition and the contract price agreed upon between the parties and paid therefor. (P. 70, Record). Caswell *vs.* Coare, 1 Taunton, 566. Courtney *vs.* Boswell *et. al.*, 65 Mo., 196. McAlpin *vs.* Lee, 12 Conn., 128. Clark & Co. *vs.* Neufville, 46 Geo., 261. Crabtree *vs.* Kile *et. al.*, 21 Ill., 180. Wintz *vs.* Morrison, 17 Texas, 372. Scranton *vs.* Filley, 16 Texas, 183. Anderson *vs.* Duffield, 8 Texas, 237.

Error without prejudice. Should there be any error in the instructions given as to the measure of damages the plaintiff in error is in no situation to complain of it. The machines were under the control of agents of the vendors at various towns in Nebraska and at which places they were to be delivered to vendee (p. 4 and 5 of Record) free from all liens, incumbrances, taxes and freight charges (p. 5 Record), and plaintiffs in error fraudulently represented that they were so free, when the sale was perfected by the second agreement (p. 6 and 35 of Record), whereas each and all of said machines at the several places were in the custody of agents of vendors, who refused to deliver the same to the vendee on demand, and were encumbered by liens for freight, storage, and commission due such agents (p. 7 Record), and the action was to recover the consideration paid for said machines.

The answer admits the truth of these allegations by claiming that the vendors were to have until the spring of 1878 to discharge these liens and make good the warranty (p. 35–38 Record), and the vendors sought to introduce proof that at a time—subsequent to the bringing of this suit—they had discharged such liens of their agents, and others, and were ready to deliver the machines.

There never was a delivery of the machines therefore and McPherson was entitled to recover the purchase money paid, $21,775.00, and not limited to damages by reason of defective machines, and by which holding he recovered only $6,848.25.

McPherson never received the machines and there was no delivery to him. Benjamin on Sales, section 174, says: "But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor." See also Chitty on Contracts, vol. I, (11th ed.) p. 555. Bentall *vs.* Burn, 3 B. & C., 423. Farina *vs.* Home, 16 M. & W., 119.

The refusal of the agents of the plaintiffs in error to deliver the machines to McPherson was the same in effect as if the plaintiffs in error had in person refused to let McPherson have possession of the machines. Plaintiffs in error are not therefore in a position to insist that the machines were delivered to McPherson or that he should be confined in his recovery to simple damages based on defects in the machines.

The claim that time was extended within which the machines might be put in condition as warranted is not well taken. In the answer (p. 38 Record) it is averred that at a time subsequent to the execution of the contract, the plaintiffs in error promised to discharge liens and put machines in order as warranted. This defense is inconsistent with the defense that machines were delivered, and contract complete, at execution of contract in November.

This pretended contract was not in writing, and was not based upon any new consideration. All they then did or agreed to do was only what they had warranted was already done. It could not, therefore, effect the rights of McPherson under the written contract. Hansborough *vs.* Peck, 5 Wall., 497. Stryker *vs.* Vanderbilt, 27 N. J. S., 68.

During the progress of the trial, the answer in this regard, was amended (p. 48 Record) by averring that this oral contract was made before, at the time of, and subsequent to, the written contract. This did not, however, relieve the case of the objections above named, but

brought out a new objection, to-wit: that such pretended oral agreement must have been merged in the written contract.

There was no error, therefore, in refusing to hear the testimony of witnesses to such oral agreement, and as to what repairs, if any, the Marshes subsequently made to any of the machines.

The testimony offered to show that plaintiffs in error under this pretended oral agreement made repairs to the machines, is subject to the further objection, that what they thus did was a voluntary act on their part and the repairs were made after the commencement of this suit, to-wit: in February and March, 1878 (p. 73–74 Record), and the suit was commenced January 15th, 1878, (p. 3 Record).

Bill of Exceptions not allowed in time. The Court made an order allowing forty days from date of overruling motion for new trial to file Bill of Exceptions (p. 61 Record), which extended after the session of the Court. This order was made not by virtue of any rule of the Court but by reason of a State law, which we believe has no application to practice in United States courts. The Bill of Exceptions was allowed and filed after the close of the session of the Court at which the trial was had, and should therefore not be entertained in this Court.

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